

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, et al.

Plaintiffs,

Civil Action No.
1:21-cv-11558-LTS

V.

AMERICAN AIRLINES GROUP, INC.,
et al.,

Defendants.

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

BENCH TRIAL

Day 11

Thursday, October 13, 2022
9:00 a.m.

John J. Moakley United States Courthouse
Courtroom 13
One Courthouse Way
Boston, Massachusetts

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Official Court Reporter
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None

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(In open court.)

THE DEPUTY CLERK: The United State District Court
for the District of Massachusetts is now in session.

THE COURT: Please be seated.

A couple things before we begin. One was that at the end of the day, there was a question about motion to strike one answer, the last answer of the witness. So let me just explain, I'm not going to -- I'm denying the motion to strike. I'm not going to strike the answer, but I think there's a couple practical things to think about as you go forward. One is that -- you don't -- you don't need -- I understand the testimony, and I will not forget it, it's been stated a number of times, that your opinion is that Newark is not sufficient draw to constrain what you've described at LaGuardia and Newark. So if Mr. Wall asks you a question -- so one, I don't need you to repeat it. It's -- I got it. And if he asks you is somebody a substantial competitor or a well competitor, or whatever, if you can't answer that -- if it's framed as a yes/no question, and you can't answer it as a yes/no question, because, in your view, you don't understand the meaning of well or effective or strong, you can say that, I can't answer it as a yes or no, because I don't know what that means. And then Mr. Wall can decide how he wants to proceed with that. And, but, this sort of going

1 on -- you just answer the question.

2 I'm not saying this, like -- this comes up a lot
3 with witnesses. The hard part about witnesses is you just
4 get to answer the questions posed. And the government's
5 lawyers will well -- anything that they want you to explain,
6 they get another crack and they will ask you on anything they
7 want you to elaborate on, or why, and tell us about that, or
8 whatever you want to ask, and then you'll get the chance, if
9 they want to elicit that if they want to do that, so don't
10 worry about that.

11 All right. Second thing I just wanted to --
12 there's a couple of things that I was thinking about. I was
13 saying at sort of the end of the day yesterday, so I thought
14 I'd just tell you now. Here is three things that I'm -- that
15 are just in my mind that I'm, like, interested in. And one
16 is, it seems to me that one thing that seems to be in dispute
17 between you is, essentially, how big the fleets were. All of
18 this relates to what was available to do or not to do. And I
19 don't have a -- it may be clear in all of the evidence. I
20 don't know, because I haven't read all the exhibits yet, but
21 to the extent you can, at some point, point me to -- or
22 either in your statement of facts that you give me or in some
23 other submission or chronology or something, that shows like
24 what were the state of the fleets at the relevant times like,
25 from preNEA and early to mid 2019 through, I don't know,

1 2022, or something like that, of how many planes, how big,
2 what was added and subtracted and retired, as well as at
3 those different moments, what the state of anticipation was.
4 Because all of these different points, people are making
5 decisions not retrospectively like me, but prospectively. So
6 on this given date in time, when they had this state of
7 fleet, what was in the queue, what had been ordered, and what
8 had been retired, what had been unretired, and where were
9 they in terms of those things, that would be, I think, just
10 helpful to figure that out.

11 And so the second would be the same kind of thing
12 with respect to routes, because there also seems to be a
13 disagreement between the two sides over, like, did -- is
14 there more? Is there more and is the more because of the
15 NEA? So it might be helpful to see for the four NEA
16 airports, again, like starting in early mid 2019, some kind
17 of description of the routes flown in and out, the routes
18 that have been eliminated or added, that -- the quantity of
19 seats, or if there are other -- if you want to measure it
20 just beyond routes, quantity of seats, ASMs, departures,
21 O&Ds, some things like that which would be metrics or
22 different forms of metrics for that. And whether on that the
23 vagaries -- like what was eliminated -- like how many
24 snapshots. I'm not sure I need a weekly snapshot of that
25 over this entire period of time. So in the first instance, I

1 would defer to all of you what's a reasonable period,
2 snapshots along that timeline. Because I would imagine that
3 between March of 2020 and July of 2020, there had to be huge
4 swings -- maybe not swings, but maybe just cratering, but in
5 any event, that.

6 The third point is, which we sort of talked about,
7 but just to -- at some point, I would like to have a back and
8 forth about the -- some of the key provisions of the NEA to
9 make sure that I understand them and the questions that I
10 have -- that you can tell me, each of your respective
11 understandings of them, that might just be a back and forth
12 with the lawyers. But -- and so that if I have questions
13 about it, I can ask them, and you can tell me, you know, no,
14 that's -- that's the wrong interpretation, because there's
15 this or that, or whatever. So I don't go down some -- I at
16 least have the benefit of everything, and you all think about
17 it.

18 At the moment, those are the other topics that come
19 to mind. If there are others, I'll bring them up.

20 Okay. Ready to proceed?

21 MR. WALL: Yes, Your Honor. Thank you.

22 THE COURT: Thank you.

23 **NATHAN H. MILLER, Ph.D.**

24 having been duly sworn, testified as follows:

25 **CROSS-EXAMINATION BY COUNSEL FOR**

1 **DEFENDANT AMERICAN AIRLINES, Continued**

2 BY MR. WALL:

3 **Q.** Good morning, Dr. Miller.

4 **A.** Good morning.

5 **Q.** So yesterday you talked a lot about the Hypothetical
6 Monopolist Test and your application of it. I take it you
7 are aware that in a world of antitrust law and economics,
8 there are other standards or tests for defining geographic
9 markets?

10 **A.** I've implemented -- I'm not aware of the others that
11 would apply in this instance.

12 **Q.** Okay. Well, let me suggest a couple, and we'll talk
13 through them.

14 The first one, it actually comes from a court case,
15 the Supreme Court decision in the *Tampa Electric* case, and
16 I'll put it up on the screen here. It says that, "The
17 geographic market in an antitrust case is the area in which
18 the seller operates into which the purchaser can practically
19 turn for supplies." Do you see that?

20 **A.** Yes, I do see that.

21 **Q.** Are you familiar with that standard?

22 **A.** It sounds an awful lot like what I've implemented.

23 **Q.** Okay. So have you analyzed geographic market definition
24 pursuant to that standard?

25 **A.** I've used the Hypothetical Monopolist Test, but my

1 interpretation of this sentence is that it's -- it reads
2 pretty similar to the Hypothetical Monopolist Test.

3 Q. Okay. Let's just, for the sake of this discussion, take
4 the Hypothetical Monopolist Test out of it, and just talk
5 about the -- the two concepts that are in -- on the screen,
6 the area in which the seller operates and then the area to
7 which the purchaser can practically turn for supplies. Now,
8 with that in mind and, again, putting aside your Hypothetical
9 Monopolist Test for now, do you dispute that United Airlines
10 tries to sell its services to New Yorkers, and in that sense
11 operates in New York?

12 MR. DOIDGE: Your Honor, if I can just object to
13 the extent we're putting aside the Hypothetical Monopolist
14 Test, which is embedded in anything that Mr. Wall is about to
15 ask the witness, since it is the core concept that relates to
16 how markets are defined, as articulated by the courts, by the
17 *Horizontal Merger Guidelines*, by the FTC, by the DOJ. It's
18 not quite clear to me what the contrast Mr. Wall is trying to
19 make here, and I don't exactly see how the witness could make
20 the contrast, either.

21 THE COURT: I think he's entitled to say to the
22 witness, I want you to -- here's this quote, which I assume,
23 on the representation from Mr. Wall, comes from a Supreme
24 Court case. I think he's entitled to ask the witness, like
25 parse this and apply -- and the witness's understanding as an

1 expert, apply these words to sort of facts and see what the
2 witness says. So in the sense that he's -- what I understand
3 the -- not part of the question, put aside the hypothetical
4 monopolist, what he wants him to do is focus on this, right?
5 And that's, like -- he's saying -- I think what he's asking
6 is the area in which the seller operates, is that for United,
7 New York City? Or the metropolitan New York may be framed a
8 little bit differently. The metropolitan New York area. I
9 think he's -- why isn't he entitled to do that?

10 MR. DOIDGE: All right.

11 BY MR. WALL:

12 Q. Okay. Let's just go with that question as Judge Sorokin
13 framed it. Do you dispute that the area in which
14 United Airlines sells its services to New Yorkers, and in
15 that sense operates in New York, is the New York metropolitan
16 area?

17 A. No, I believe it targets customers throughout the New
18 York metropolitan area.

19 Q. Okay. And likewise, with other airlines that are
20 operating from Newark, do you agree that they also operate in
21 the larger New York metropolitan area, in the sense that they
22 try to sell their services to consumers that are located
23 there?

24 A. I do. I don't see why that's relevant for the
25 interpretation of the first clause here.

1 **Q.** That's fine. Your counsel can explore that with you.
2 But likewise, I assume that you would agree with me that all
3 airlines also sell or try to sell their services to consumers
4 that are located on both sides of a route?

5 **A.** Can you clarify by what you mean by both sides of the
6 route.

7 **Q.** Sure. Take it hypothetically. You don't have to take
8 this as a hypothetical. Take service between Los Angeles and
9 New York. Airlines that serve that try to sell those
10 services both to people who live in Los Angeles and are
11 traveling inbound to New York, and then returning home. And
12 people in New York, who are flying outbound to Los Angeles
13 and then returning home?

14 **A.** Yes, that's correct.

15 **Q.** Okay. And so the area which sellers operate with respect
16 to any flight is actually the sources of demand on both ends
17 of the flight, correct?

18 **A.** That's confusing to me.

19 **Q.** I'll rephrase. If it's confusing, it's my job to fix it.
20 You don't have to fix the question. What I'm asking you is,
21 do you agree with me, that with respect to any flight, there
22 is some amount of the demand for that flight that is one end
23 of the service, and some amount of a flight that is at the
24 other end of that service?

25 **A.** Yes, I agree with that.

1 **Q.** Okay. And the airlines that are operating on that route
2 are attempting to sell that service to people at either end.

3 **A.** So people going, in your example, from LA to New York and
4 back.

5 **Q.** Yes.

6 **A.** Or New York to LA and back.

7 **Q.** Yes.

8 **A.** Yes, that seems right to me.

9 **Q.** So they're not just operating on one end, they're
10 operating on both ends, right?

11 **A.** That's correct.

12 **Q.** That's the nature of the transportation product, right?

13 **A.** That's correct.

14 **Q.** Okay. And so did you hear or read the testimony of
15 Mr. Watterson from Southwest that Newark airport, in his
16 words, quote, "skews towards customers who originate their
17 journey in New York City," end quote.

18 **A.** Do you have the transcript for that?

19 **Q.** I do, sir. It's on day two of the trial, transcript. I
20 can put it up on the screen, I believe. This is part of it.
21 I'm asking a question. "You can see that, in fact, Southwest
22 ceased operations at Newark-Liberty Airport in part because
23 Newark, as you put it, skews towards customers who originate
24 their journey in New York City and Southwest was unable to
25 generate that kind of local customer base, right?"

1 And he answers, "Yes, sir," and goes on after that.

2 Do you recall that testimony?

3 **A.** Yeah. You don't have a paper copy, do you? I'm just
4 curious whether there's more context around this.

5 THE COURT: You can flash -- you can give him a
6 paper copy, or get rid of the blowup.

7 MR. WALL: Give rid of the blowup.

8 THE COURT: And when you're ready, you want to go
9 to the next page or the previous page, tell them.

10 MR. WALL: You can definitely go to the next page
11 for some more context.

12 THE WITNESS: (Witness reviews document.) Can you
13 go to the next page, please?

14 MR. WALL: Uh-huh. It's up now.

15 THE WITNESS: Oh, yes.

16 BY MR. WALL:

17 **Q.** Okay. So I presume you would agree that airlines
18 operating from an airport that skews towards customers who
19 originate their journey in New York City are operating in the
20 greater New York metropolitan area, correct?

21 **A.** I think that's what my analysis is -- has looked at.

22 **Q.** Okay. So we agree that the airport -- that the airlines
23 that are operating from Newark are operating in New York?

24 **A.** They tend to sell tickets from Newark to all sorts of
25 consumers, I imagine.

1 **Q.** Great. So let's go back and talk about the second part
2 of the *Tampa Electric* standard, which is the -- to which the
3 customer could practically turn. Now, as we said, there are
4 broadly speaking, two classes of customers, the inbound
5 customers who don't live in a region at all, and the outbound
6 passengers who live in a region and are flying out and back,
7 right?

8 **A.** That's right.

9 **Q.** And you don't dispute, do you, that inbound passengers to
10 New York are not constrained or influenced in their choice of
11 airports by living particularly close to Newark-Liberty
12 Airport, LaGuardia Airport, or JFK Airport?

13 **A.** I would disagree with that. I think that comes through
14 the demand model and it also shows up in the taxi data that I
15 analyzed.

16 **Q.** Okay. So let me see if I get this right. You are saying
17 that someone like me, that lives in San Francisco and flies
18 to New York, business or pleasure, will be constrained in my
19 choices by where I live? That was my question.

20 **A.** No, in Los Angeles?

21 **Q.** In San Francisco, East Bay, actually, but a little closer
22 to all those airports?

23 **A.** I lived in East Bay, actually, it's nice.

24 No, I wouldn't think where you lived in San
25 Francisco was particularly relevant for your choice of

1 airports. What might depend more is where you want to go in
2 New York City when you get there.

3 **Q.** Indeed, and if I were going to Manhattan, and I don't
4 want to fly connecting, so I want to take a nonstop flight,
5 my choices are Newark and JFK, right?

6 **A.** Wherever you go, you can choose from those three
7 airports.

8 **Q.** Yeah, that wasn't my question, sir.

9 **A.** Including in Manhattan.

10 **Q.** Yeah. What I was saying, sir, is that flying beyond the
11 perimeter rule of transcontinentally, if I want to fly
12 nonstop, I have two choices. I can go to Newark or I can go
13 to JFK, right?

14 **A.** Or potentially LaGuardia on Saturdays.

15 **Q.** But nobody actually offers that service, do they, sir?

16 **A.** Oh, nonstop. Okay. That's right.

17 **Q.** Okay. And you have not seen any evidence that inbound
18 passengers have a significant preference for JFK versus
19 Newark, have you?

20 **A.** No, I think I have. And I explained yesterday that the
21 taxi data includes -- logically includes folks that are both
22 outbound and inbound.

23 **Q.** You testified at your deposition that you weren't able to
24 isolate that phenomenon, right?

25 **A.** Yeah, the taxi data puts both of those together in one,

1 but it ends up being consistent with the other sources of
2 data.

3 **Q.** Okay. Let's look at what you actually said in your
4 deposition. You should have it in front of you, and we're
5 going to pull up page 248, lines 8 through 248, line 16.

6 **A.** Of the deposition.

7 Wait, I'm sorry, which page?

8 **Q.** 248. So line 8, are you there?

9 **A.** Yes.

10 **Q.** "QUESTION: What about passenger who don't live in New
11 York at all that are flying into New York. Do you have any
12 evidence that they have a significant preference for JFK
13 versus Newark?"

14 And if you go down a little bit after the words
15 "The witness," it says, "I would have to look in the report.
16 In terms of the data analysis, I don't recall being able to
17 isolate that beyond what comes through the demand estimation
18 results." Right?

19 **A.** Yeah, that's consistent with what I've just said.

20 **Q.** Okay, so what about -- I'll just ask you, what about your
21 demand estimation results tells you whether inbound
22 passengers have a preference for JFK flights -- JFK
23 transcontinental flights versus Newark transcontinental
24 flights?

25 **A.** Well, when I estimate the model, I estimate separately

1 the routes that go from San Francisco to New York and back,
2 and there's a different model that goes from New York to San
3 Francisco and back. And I implemented it that way, because I
4 wanted to take into account that a presence of a hub might
5 effect demand on the originating side. And so in that sort
6 of sense, when I test the market specifically for San
7 Francisco to New York and back, it passes. And just as it
8 passes if you start from New York to San Francisco and back.

9 **Q.** But the fact is that, in that demand model, flights to
10 Newark are just part of the composite that you call the
11 outside good, correct?

12 **A.** That is correct.

13 **Q.** So in the case of someone like myself traveling from San
14 Francisco, the option to go to Newark Airport is no different
15 econometrically than the option of taking a flight to Los
16 Angeles and then driving to New York, correct?

17 **A.** They have that option, it includes all of that, but it's
18 even more substitution between them specifically.

19 **Q.** Right. There's no distinction between driving to Los
20 Angeles -- flying to Los Angeles and driving to New York, or
21 taking a nonstop United Airlines flight from San Francisco to
22 Newark, correct?

23 **A.** Yeah, from a modeling perspective, that distinction
24 doesn't need to be made.

25 **Q.** Okay. And so roughly speaking, the inbound traffic on

1 any route is going to be close to half of the demand that, as
2 it interacts with supply, determines prices, right?

3 **A.** I don't want to -- I haven't looked at particular routes
4 to know if it's half or more than half. So I shouldn't opine
5 on that.

6 **Q.** Okay. We discussed that at your deposition and you said
7 you thought that that was probably correct as an
8 approximation, right?

9 **A.** Yeah, I would think that -- I don't know if it applies
10 specifically to New York, but as an approximation, it seems
11 like half is -- who can argue with half.

12 **Q.** Right. You have your deposition in front of you. You
13 can look at page 249, line 14, to 249, line 18.

14 "QUESTION: Okay. So on these New York routes,
15 half, approximately, of the demand elasticity is coming from
16 passengers who don't live in New York at all; right?

17 "ANSWER: To an approximation."

18 You gave that testimony, right?

19 **A.** Yes, I do.

20 **Q.** Okay. Now, you do understand that published fares for
21 domestic airline service are bidirectional, meaning that
22 airlines publish the same fare in either direction, right?

23 **A.** Yes, I do.

24 **Q.** Okay.

25 **A.** Now, by fare, though, do you mean the fares that come

1 through ATPCO, or do you mean the fares that are available to
2 consumers at a particular point in time?

3 **Q.** I mean the published fares. You know what a published
4 fare is, right?

5 **A.** Is this the fare on ATPCO?

6 **Q.** Yes. That's the published fare.

7 **A.** Okay. So is that also the price that's available to the
8 consumers?

9 **Q.** Do you know?

10 **A.** You know, network, the details of do I know, I think I
11 know, I don't want to testify to something that I'm not
12 100 percent sure to.

13 **Q.** Well, go ahead and take a shot at it. What do you know?

14 **A.** I don't want to opine on something when I'm under oath,
15 when I'm not 10 on 30 percent sure.

16 THE COURT: You're not opining here. You're just
17 stating --

18 THE WITNESS: What I know.

19 THE COURT: -- what you know.

20 THE WITNESS: Okay. So my impression, what I
21 recollect is that there's a list of prices that go on ATPCO,
22 and the ones that are available to consumers at a particular
23 point in time will depend on certain demand conditions and so
24 it's possible that, for example, there might be a set of
25 fares that goes one direction, and a set of fares that goes

1 the other direction, and these are the same set of fares that
2 are available in both directions, but the ones that they make
3 available to consumers at a particular point in time can
4 differ just based on how fast the plane is filling up and
5 other considerations. So this is why I'm asking whether, you
6 know, we're talking about the fares that are on ATPCO or the
7 prices that are available to consumers. And I do have the
8 understanding that, as Mr. Wall suggests, that the prices
9 that are posted on ATPCO are the same both ways, but also
10 that the prices that are available to consumers at any point
11 in time might differ, but this is -- you know, that is --
12 like I said, that's my understanding.

13 BY MR. WALL:

14 **Q.** But in terms of the way that your simulation model
15 predicts pricing behavior, it's talking about the published
16 fares, correct?

17 **A.** It's talking about the average prices that are available
18 to consumers.

19 **Q.** Yeah, which begins with a decision by the airlines
20 internalizing diversion and all of that, which we will
21 discuss, to establish a new and different published fare,
22 correct?

23 **A.** No, there's no linkage between the average prices that I
24 look at and the particular fares that are on ATPCO.

25 **Q.** Okay. In all events, getting back to this

1 bidirectionality, it is your expectation that a rational
2 actor, in setting the published fare, is going to try to
3 account for the elasticity of the demand that is coming from
4 passengers traveling in both directions, correct?

5 **A.** There's some nuance there, because there's another set of
6 considerations when you post a set of fares that can be made
7 available in both directions. But when I think about the
8 prices that arise, that are available to consumers, I would
9 agree that that would incorporate information on consumer
10 willingness to pay, and demand elasticities, along with other
11 considerations.

12 **Q.** And the elasticities are coming from passengers traveling
13 in both directions, correct?

14 **A.** No, the relevant elasticity would be the elasticity of
15 demand going in one direction.

16 **Q.** Okay. Let's take a look at your deposition on page 249,
17 line 7, through 249, line 13.

18 "QUESTION: Okay. So would you expect, then, a
19 rational actor in setting the published fares is going to try
20 to account for the elasticity of demand that is coming from
21 passengers traveling in both directions?

22 "ANSWER: Yes, that would -- that would be my
23 expectation."

24 You gave that testimony, did you not, sir?

25 **A.** Yes. And that's consistent with --

1 **Q.** That's fine. That's the extent of the question.

2 **A.** Okay.

3 **Q.** So let's talk about the New York originating side of a
4 route. It is on that New York side of the customer set that
5 some people live close to one New York City airport or
6 another, right?

7 **A.** I'm sorry, I just lost focus. Could you restate the
8 question? My apologies.

9 **Q.** Sure. I'm focusing now on the New York side of a route,
10 of a route with a New York end point. Okay?

11 **A.** Uh-huh.

12 **Q.** Now, that's a side of the route in which you might see
13 this phenomenon of some people living particularly close to
14 one New York airport or another?

15 **A.** That's right.

16 **Q.** Okay. And within the greater New York region, what
17 you're going to have is a mix of people who live particularly
18 close to one airport, and those that don't live particularly
19 close to -- or closer to any one airport, right?

20 **A.** That is correct.

21 **Q.** Okay. But putting aside anything that you might say is
22 inherently accounted for in your simulation, you made no
23 effort to quantify the portion of the New York side demand
24 elasticity that is coming from passengers who can practically
25 turn to any of the three New York metropolitan airports, did

1 you?

2 **A.** The question is asking me to -- whether I sought to
3 quantify it in any way, other than the way I sought to
4 quantify it?

5 **Q.** Other than your demand model?

6 **A.** That's how I quantified it.

7 **Q.** You did indeed. Thank you, sir. We'll move on.

8 So you are not in a position here today to testify
9 about what portion of the New York side demand pool can or
10 cannot practically turn to Newark, JFK, or LaGuardia
11 airports, are you, sir?

12 **A.** No, that would be incorrect.

13 **Q.** Okay. So do you have any data to which you can point to,
14 which says what percentage of the New York side demand pool
15 can practically turn to Newark?

16 **A.** Again, "practically" is an adjective that I don't have a
17 particular meaning for. Instead I'm looking to understand
18 substitution patterns.

19 **Q.** Okay. Then let's change it. What data do you have that
20 can tell us what percentage of the New York side demand pool
21 is presently utilizing flights from Newark?

22 **A.** In any capacity? The taxi data suggests that people
23 choose Newark from all over the place, as do the frequent
24 flyer data and the JetBlue data. The question is how often
25 does that occur. The demand analysis speaks to this, as

1 well.

2 **Q.** Okay. Well, let's go back to that question. How often
3 does it occur? Did you present data on how often it occurs
4 that people who live in the New York metropolitan area choose
5 flights from Newark?

6 **A.** Yes. And I've done so with four different data sets.

7 **Q.** Which is the data set that, in your view, most clearly
8 speaks to the question of what percentage of the New York
9 side demand pool chooses Newark?

10 **A.** I imagine the data that would be most comprehensive for
11 analyzing that question would be the DB1B data that's
12 published by the Department of Transportation.

13 **Q.** So you could just look at consumption patterns based upon
14 DB1B data, is you're saying?

15 **A.** Yeah, but you could do better than that, as well. That's
16 what I tried to do.

17 **Q.** Okay. So where in your report is there an analysis of
18 the DB1B data that shows how many New Yorkers choose to fly
19 out of Newark?

20 **A.** That comes through the demand model as I've studied the
21 choices that consumers make.

22 **Q.** Right. And in -- in which the choice to make of going to
23 Newark is lumped into the outside option with everything
24 under the sun?

25 **A.** Yes, but I don't --

1 **Q.** Okay. Let's move on to the next question, then, sir,
2 which is aside from your demand model, where in your report
3 do you present any analysis of the DB1B data indicating what
4 percentage of the New York side demand pool chooses Newark?

5 **A.** Well, the demand model is what uses the DB1 data, the
6 DB1B data. As I said, there are others sources of data that
7 I've used that are consistent with the conclusions I reached
8 based on the DB1B.

9 **Q.** Indeed, but to be clear, you just said that the most --
10 that best data available for this would be the DB1B data.
11 And besides what you say is found in your demand model, you
12 didn't present an analysis of the DB1B data showing what
13 percentage of the New York demand pool chooses Newark, did
14 you? Yes or no?

15 **A.** Well, I think you're maybe mischaracterizing what you
16 said. I tend to say the most comprehensive source would be
17 the DB1B, and that's because it's got all of the ticket sales
18 in it. I don't know if it's the best. You know, the
19 frequent flyer --

20 **Q.** I'll go with comprehensive. I'm fine with comprehensive,
21 if that's the issue here.

22 **A.** Okay.

23 **Q.** Okay. So again, putting aside what you say is inherently
24 accounted for in your demand model, where in your report did
25 you present an analysis of the DB1B data to show what

1 percentage of the New York side demand pool elects to buy
2 service from airlines operating out of Newark?

3 **A.** I may be misremembering, but I think that my analysis of
4 the DB1B comes through the demand model and doesn't show it
5 elsewhere.

6 **Q.** Okay. Thank you, sir.

7 Now let's get a little more granular, and for this,
8 we'll put up your slide 60.

9 **A.** Oh. I'm sorry, I think I do remember something now, in
10 response to your last question.

11 **Q.** Go ahead.

12 **A.** I believe there are figures at the end of the report that
13 break down shares in New York City using the DB1B data. It
14 might be in my reply report. So a complete answer would
15 probably include that.

16 **Q.** Right. So these are the shares that would include Newark
17 in the New York end points.

18 **A.** Yeah, I can check, if you'd like me to.

19 **Q.** No, we'll be getting to those, so we can talk about them
20 at that time.

21 Okay. Slide 60. This is your simulation results
22 for New York City. And by the way, just to make sure there's
23 no confusion about this, when this says in the
24 title, "Results for New York City and Newark nonstop
25 overlaps," Newark is in there only because of the very last

1 entry, which is a distinct and separate entry for flights
2 from Newark to Miami, correct?

3 **A.** That's correct.

4 **Q.** Okay. Otherwise, everything here excludes flights from
5 Newark, correct?

6 **A.** It includes the flights from Newark as a competitive
7 option for consumers.

8 **Q.** That's part of the outside good?

9 **A.** That's correct.

10 **Q.** Okay. Got it.

11 All right. So the second entry here is that Los
12 Angeles one, which, again, would be that group of LA basin
13 airports on the West Coast, and your New York side markets.
14 And on that one, you're predicting \$54 million of harm. So
15 focusing on that, is it your testimony that right now,
16 without regard to some attempted future price elevation,
17 United and other airlines flying Newark to LAX are not
18 competing for both inbound and outbound passengers and
19 against the LaGuardia -- well, it wouldn't be a LaGuardia,
20 but against the JFK nonstop options?

21 **A.** I want to make sure I get -- I think the answer is no and
22 I just want to make sure I understand the question. The
23 model incorporates the competition from Newark for those
24 passengers and I do believe they compete for those
25 passengers.

1 **Q.** Okay. Again, in the outside good, not distinctly, in the
2 way that JFK and LaGuardia are distinct, right?

3 **A.** That's correct.

4 **Q.** Okay. So Los Angeles would be a route beyond the
5 perimeter rule, right?

6 **A.** That would be right.

7 **Q.** So there are no nonstop service from LaGuardia, right?

8 **A.** I would want to confirm that, but if you tell me that's
9 the case, I can go with it.

10 **Q.** You can go with it.

11 **A.** Okay.

12 **Q.** And that means that, to utilize LaGuardia, a consumer
13 would have to connect somewhere, right?

14 **A.** That's right.

15 **Q.** And that would add, on average, about two hours to a six
16 hour flight, assuming that everything is on time, right?

17 **A.** I don't know.

18 **Q.** Okay. And you testified yesterday that, because of the
19 extra time and hassle of -- traffic tends not to be very
20 popular, right?

21 **A.** On average, less popular than the nonstop traffic.

22 **Q.** Right. But you put LaGuardia connecting service in your
23 New York side relevant markets, while excluding Newark
24 nonstop service from your New York relevant markets, correct?

25 **A.** Yes, that's correct.

1 **Q.** Okay. Do you know which airlines provide nonstop service
2 between New York and Los Angeles?

3 **A.** Not off the top of my head.

4 **Q.** Okay. Well, the day before yesterday, we sent plaintiffs
5 a demonstrative that compiles official airline guide to data
6 that is in the record that identifies who offers nonstop
7 service between New York and LA.

8 Did you get a chance to review that?

9 **A.** No, I've been told not to look at what's in here,
10 whatever is in this --

11 **Q.** No, it was sent a couple of days ago. If you didn't, you
12 didn't. That's fine?

13 **A.** I don't know exactly. I did review a little thing. I
14 don't know if that's what you're referring to.

15 Oh, I know, yeah. Okay. I know what you're
16 referring to now.

17 **Q.** Okay. Let's put the little thing up.

18 THE COURT: Is that what you looked at?

19 THE WITNESS: Yeah.

20 BY MR. WALL:

21 **Q.** So what you see here is this is a compilation of an OAG
22 data. It's been marked as DX06736. The data is DX0736 and
23 is admitted --

24 THE COURT: Just before you ask that question, I
25 want to make sure I understand the last little exchange

1 before that. You -- I'm not sure I totally understand this,
2 so I want you to explain it to me. You excluded Newark
3 nonstop flights from the relevant market, but included --
4 just explain -- included LaGuardia change?

5 **A.** Anything from LaGuardia to JFK is in my market.

6 THE COURT: So within -- I see, so within your
7 market as a distinct option, is JFK flights and LaGuardia
8 flights, whether they're nonstop or connect.

9 THE WITNESS: Connect.

10 THE COURT: Then there is a category called other
11 and other is everything else.

12 THE WITNESS: Everything else.

13 THE COURT: And that would encompass Newark nonstop
14 flights, Newark connecting flights, or Mr. Wall's preferred
15 method, which would be to fly to LA and drive.

16 THE WITNESS: Or not travel.

17 THE COURT: Or not travel at all. Or take the
18 train.

19 THE WITNESS: Yeah. That's right.

20 THE COURT: Okay.

21 BY MR. WALL:

22 **Q.** So which has less social utility, flying to LA and
23 driving or not flying at all -- never mind.

24 **A.** I'm trying to do the admissions calculation.

25 THE COURT: It depends on your social utility of

1 your arrival in New York.

2 BY MR. WALL:

3 Q. Okay. So anyway, getting back to work here, the
4 demonstratives that is up on the screen shows you, does it
5 not, that United Airlines services New York to Los Angeles
6 from both Newark and JFK?

7 A. Yes, I see that.

8 Q. Okay. It also shows you that spirit, NK, serves
9 Newark/Los Angeles from Newark, right?

10 A. Yes.

11 Q. It shows you that Delta offers quite a bit of service on
12 New York/Los Angeles from JFK, right?

13 A. I do see that.

14 Q. And if we go forward -- okay. So B6 is JetBlue and you
15 can see that JetBlue serves New York/Los Angeles from both
16 Newark and JFK, right?

17 A. JetBlue -- I was able to look into why they did that --

18 Q. We'll get to that later on. Let's just stick with my
19 questions for now.

20 A. Okay.

21 Q. So -- and then Alaska serves New York/Los Angeles from
22 Newark, right?

23 A. That's right.

24 Q. And then finally, American serves it from JFK, right?

25 A. That's correct.

1 **Q.** So in your market definition, the United, Spirit,
2 JetBlue, and Alaska service from Newark falls outside the
3 relevant market, correct?

4 **A.** That's correct.

5 **Q.** But everyone's connecting service to or from LaGuardia is
6 in the relevant market, correct?

7 **A.** That's correct.

8 **Q.** Now, if I live in Los Angeles and I want to fly to New
9 York for a business meeting or maybe to see a Broadway show,
10 both airlines operating to Newark and operating to JFK
11 provide service to which I can turn to meet my needs, right?

12 **A.** They have flights that you can take nonstop.

13 **Q.** Nonstop?

14 **A.** Nonstop flights, yes.

15 **Q.** Yes. So in other words, I can choose to fly to Newark on
16 Alaska, Spirit, United, or JetBlue, or I can choose to fly to
17 JFK on American, JetBlue, or Delta, right?

18 **A.** Yes, I think that's right.

19 **Q.** I have both sets of choices, not one or the other, right?

20 **A.** You have those choices available.

21 **Q.** Okay. So let's go on, then, to New York City to San
22 Francisco. Now, you are aware, are you not, that United is
23 by far the largest legacy airline operator in San Francisco?

24 **A.** Yeah, I'm aware they have a hub there.

25 **Q.** Right. And we put up another part of the demonstrative

1 here that has OAG data on San Francisco, and in what you can
2 see here is that United offers eight flights a day from
3 Newark, seven of which are Boeing 737s, and the eighth is a
4 757. Right?

5 **A.** Yes, I do see that.

6 **Q.** Okay. But none of that United Airlines capacity makes it
7 into your relevant market for New York City to San Francisco,
8 right?

9 **A.** Yes. I exclude flights from New York from the LaGuardia
10 JFK markets.

11 **Q.** Right. And again, San Francisco is beyond the perimeter
12 rule, right?

13 **A.** That's true.

14 **Q.** And so in your market definition, the nonstop United
15 Airlines triple 7 service from Newark falls outside the
16 relevant market, but everyone's connecting service to and
17 from LaGuardia is in your relevant markets, right?

18 **A.** That's correct.

19 **Q.** Okay. You're aware of the fact that in 2015,
20 United Airlines consolidated its New York metropolitan area
21 operations at Newark-Liberty Airport, right?

22 **A.** I'm not aware of that particular fact.

23 **Q.** Okay. Well, accept my representation that they did. I
24 mean, are you aware of the fact that, prior to the United
25 Continental merger, Newark was a large continental hub?

1 **A.** No.

2 **Q.** Okay. Well, let me just put it to you this way, if it's
3 true that United consolidated its New York City operations
4 from a combination of -- of JFK and Newark operations to
5 primarily New York operations --

6 THE COURT REPORTER: I'm sorry. Are you saying
7 Newark? What are you saying?

8 MR. WALL: Yeah. Newark and New York. Sorry about
9 that. Yeah. Let me try it again.

10 If you want to make an objection before I start, go
11 ahead.

12 MR. DOIDGE: I just would ask for a clarification.
13 You're not suggesting that United no longer serves LaGuardia
14 Airport, are you?

15 MR. WALL: No, of course not.

16 MR. DOIDGE: But you're saying that they
17 consolidated only to Newark in 2015.

18 MR. WALL: Fair enough.

19 BY MR. WALL:

20 **Q.** Okay. For these purposes, let's assume that the word
21 "consolidation" means to put 95 percent of your operations at
22 one airport. Okay?

23 **A.** Okay.

24 **Q.** Now, in -- assume that in 2015, United, which was at that
25 time, operating from both JFK and Newark, in addition to

1 whatever operations it had at LaGuardia, consolidated its
2 operations at Newark, so that it had 95 percent of its
3 service from Newark, okay?

4 **A.** Okay.

5 **Q.** Okay. Are you suggesting that by making that move,
6 United Airlines abandoned the largest business travel market
7 in the United States, New York City?

8 **A.** I don't know precisely what the term "abandoned" means in
9 this context and I can imagine that you might -- that they
10 might have done that for a number of reasons, but I haven't
11 studied their motivations in -- in my economic work here.

12 **Q.** Yeah, but what you are saying is that by making that
13 move, they changed their competitive significance from that
14 of an airline that is the equal to American and Delta and
15 others that are -- are flying from Newark, to that of an
16 airline that is too weak of a competitor to constrain the
17 exercise of market power, right?

18 MR. DERITA: Objection. It mischaracterizes the
19 witness's testimony.

20 THE COURT: Overruled.

21 THE WITNESS: I would say instead that the choice
22 of which airline you fly has implications for the types of
23 consumers that are going to find the product attractive.

24 BY MR. WALL:

25 **Q.** Okay. All right. Let's go forward here. Let me ask you

1 about another way to look at geographic market definition,
2 which is the way that is outlined in the *Horizontal Merger*
3 *Guidelines*. Okay?

4 **A.** Okay. Let's start with Section 4.2 of the 2010
5 *Horizontal Merger Guidelines* that is entitled "Geographic
6 Market Definition." And I've put it up on the screen and I
7 think you should have a copy in your binder if you need to
8 refer to it.

9 **Q.** Can you tell me where it is in the binder?

10 MS. NELSON: It's in the last tab.

11 BY MR. WALL:

12 **Q.** Okay. All right. Let's just blow up the first paragraph
13 of Section 4.2 on geographic market definition. The first
14 thing it says is, quote, "The arena of competition affected
15 by the merger may be geographically bounded if geography
16 limits some customer's willingness or ability to substitute
17 some products or some supplier's willingness or ability to
18 serve some customers," end quote.

19 You agree with that principle, right?

20 **A.** Yes, this is correct.

21 **Q.** Okay. So what we're looking for is the arena of
22 competition affected by the transaction under scrutiny,
23 correct?

24 **A.** No, I think -- I think the better way to think about it
25 is normally with market definition, you start with the

1 products of the merging firms, and we look at that
2 competition, and then ask sort of around those firms, what --
3 where do they compete, and what's the relevant geographic
4 market around those firms. So in this context, it would be
5 you start with the question of where does American fly, and
6 where does JetBlue fly, and you build out the analysis from
7 that starting point.

8 **Q.** So then, like, in Los Angeles, for example, then, you
9 would start with Newark and JFK, because both JetBlue and
10 American offer service to Los Angeles from those airports.

11 **A.** You would -- you mean JFK -- the products they sell are
12 distinct in the locations that the starting points. And New
13 York is a different location than JFK and LaGuardia. And so
14 I try to understand the types of customers that buy those
15 products, and for those customers that buy the products, what
16 are -- what are the available substitutes, and understand
17 those substitution patterns. So that's what the guidelines
18 is asking me to do.

19 **Q.** Are you seriously going to try to tell us that you think
20 that the JetBlue service from Newark and the JetBlue service
21 from JFK is more distinct than the JetBlue service from JFK
22 and Southwest connecting service through Nashville?

23 **A.** That's not a particular substitution that I've measured
24 in my report, but I don't think it's particularly relevant to
25 the question at hand.

1 **Q.** Okay. Let me just go on and ask you, is it your position
2 that United and other airlines operating from Newark are
3 outside the arena of competition affected by the NEA?

4 **A.** Well, I do look at some Newark routes, the Newark to
5 Miami route, and I think that that is affected, and I find
6 that as an antitrust market that the NEA impacts. But with
7 respect to the other overlap markets coming out of New York
8 City, the JFK and LaGuardia markets, what I've been able to
9 determine -- I've already said it. I've --

10 **Q.** Right. You have. So let's throw the one Newark to Miami
11 flight out of the question. My bad. Other than that one, is
12 it your position that United and the other airlines operating
13 from Newark are outside the arena of competition affected by
14 the NEA?

15 **A.** Yes, the guidelines give us a framework for thinking
16 about what the arena of competition is, and I've applied that
17 framework.

18 **Q.** Okay. Now, in fact, what the guidelines next to in the
19 process of section four, is they make a distinction between
20 two types of geographic markets, those defined by the
21 location of suppliers, and those defined by the locations of
22 customers, right?

23 **A.** Yes, they do.

24 **Q.** Okay. Let's look at the third paragraph of Section 4.2.
25 It states -- the guidelines state, "In the absence of price

1 discrimination based on customer location, the agencies
2 normally define geographic markets based on the location of
3 suppliers, as explained in subsection 4.2.1." Correct?

4 **A.** That's correct.

5 **Q.** And the reference to price discrimination is that the
6 guidelines have an alternative market definition rule for a
7 scenario in which sellers charge different prices to
8 customers, based upon information about where the customer
9 lives, right?

10 **A.** That's correct.

11 **Q.** Okay. Those markets are formally called geographic
12 markets based on the location of customers, and sometimes
13 informally called price discrimination markets, correct?

14 **A.** That's correct.

15 **Q.** Okay. And applied to this case, that would mean that
16 airlines are charging different prices to people on the same
17 flight, depending on if they lived close to one airport or
18 farther away, right?

19 **A.** Yes.

20 **Q.** Okay. But you don't have any evidence that airlines do
21 that, do you, sir?

22 **A.** No. I haven't seen any.

23 **Q.** Okay. So Section 4.21 is the section applicable to this
24 case, correct?

25 **A.** That's been my approach, yes.

1 **Q.** Okay. So let's look at Section 4.21. It
2 begins, "Geographic markets based on the locations of
3 suppliers encompass the region from which sales are made."
4 Right? That's the first principle?

5 **A.** That's correct.

6 **Q.** Okay. The next sentence says, "Geographic markets of
7 this type often apply when customers receive goods or
8 services at supplier's locations," right?

9 **A.** That's correct.

10 **Q.** And that's the case with airlines, right, customers go to
11 the airlines locations at airports to receive the service?

12 **A.** That's correct.

13 **Q.** Right. And then it says, "Competitors in the market are
14 firms with relevant production, sales, or service facilities
15 in that region," correct?

16 **A.** That's right.

17 **Q.** Which is another way of saying that the seller operates
18 in the region as with the *Tampa Electric* standards, right?

19 **A.** No, I think, you know, my interpretation of relevant, and
20 this is clarified in the guidelines is options that consumers
21 could turn to in sufficient degree to constrain the exercise
22 of market power. This is --

23 **Q.** Fair enough. Okay. That's fine.

24 THE COURT: Could or do?

25 THE WITNESS: Excuse me?

1 THE COURT: Could or do?

2 THE WITNESS: Do.

3 BY MR. WALL:

4 **Q.** Okay. So let's keep going, then. So you go down a few
5 lines past the example. The guidelines state, quote, "When
6 the geographic market is defined based upon supplier
7 locations, sales made by suppliers located in the geographic
8 market are counted, regardless of the location of the
9 customer making the purchase." That's the rule, correct?

10 **A.** I think this may be describing a somewhat different
11 situation. And I can try to parse the words, if you'd like
12 me to.

13 **Q.** Well, let's just work with that standard. Okay? Are you
14 going to dispute that there are relevant production, sales,
15 or service facilities for air passenger travel to and from
16 New York at all three major airports, including Newark?

17 **A.** So setting aside the quote on the screen, which I believe
18 we're no longer talking about, I've already described in my
19 last answer the way I interpret relevance, which is through
20 the framework that's in the merger guidelines, and that's
21 what my analysis does.

22 **Q.** So the answer is no?

23 **A.** Let's just be clear about the question, then.

24 **Q.** I'll reread it. Are you going to dispute -- well, let me
25 say it a different way.

1 Are you going to dispute that there are, within the
2 meaning of the guidelines, of the sentence of the guidelines
3 that I read a moment ago that says competitors in the market
4 are firms with relevant production sales or service
5 facilities in the region, that there are relevant production
6 sales or service facilities in the region at Newark Airport?

7 MR. DOIDGE: Objection, Your Honor. As the witness
8 has testified, the meaning of that sentence requires --

9 MR. WALL: Excuse me. He cannot give testimony in
10 the guise of an objection. And furthermore, I don't
11 understand why Mr. Doidge is standing up. Mr. DeRita handled
12 the witness.

13 MR. DOIDGE: It's been the practice so far that
14 both you and Mr. Schwed at various points in time have made
15 objection --

16 MR. WALL: We have different clients.

17 MR. DOIDGE: -- regardless of who the witness is.

18 THE COURT: So I guess there are several different
19 things. I'm not going to rigidly enforce the one lawyer
20 rule. I understand your point, Mr. Wall, and I've noted it
21 before this. But putting it aside whether -- it is different
22 to have different clients and that is a meaningful
23 distinction, but nonetheless, I'm not feeling -- the fact
24 that Mr. Doidge is standing up is not making me feel anymore
25 double teamed than I otherwise feel by the vast array of all

1 of you out there.

2 MR. WALL: Well, in that case, I'm going to ask
3 most of these people to leave.

4 THE COURT: I'm not going to prohibit -- and they
5 haven't been going back and forth. It's just been Mr. Doidge
6 has objecting to the cross, and that's fine.

7 Mr. Doidge, you shouldn't be -- the objection
8 should be what's the basis without repeating the testimony.
9 From my perspective, maybe you could just restate the
10 question, because like I think you can clarify. You had on
11 there one sentence, but I don't think -- which you took down.
12 I don't think that's the sentence you're asking about.

13 You're asking about --

14 MR. WALL: Fair enough. So let's put up the
15 previous one, the one on this competitor's -- one up. Take
16 your time.

17 THE COURT: Is the question, are you disputing
18 whether flights from Newark are relevant production within
19 the meaning of that sentence?

20 MR. WALL: More or less. I'll rephrase it just to
21 be clear.

22 BY MR. WALL:

23 Q. So the sentence in the guidelines on Section 4.2.1 says,
24 quote, "Competitors in the market are firms with relevant
25 production, sales, or service facilities in that region."

1 Are you disputing that airlines operating from
2 Newark are firms with relevant production, sales, or service
3 facilities with respect to air passenger transport between
4 the New York metropolitan area and other points?

5 **A.** Now, that question is not quite relevant. The market
6 here is based on JFK and LaGuardia, and so almost by
7 definition, if the market is based on JFK and LaGuardia, then
8 firms that are operating out of Newark don't have production,
9 sales, or services in JFK and LaGuardia, and so the answer is
10 pretty clearly that they don't, given that we're looking at
11 JFK and LaGuardia.

12 Now, I would include any competitor that does have
13 relevant production, sales, and service facilities in JFK and
14 LaGuardia.

15 **Q.** Right. But, I mean, let's just break it down. There are
16 airplanes and gates and runways and ticket counter and
17 airline personnel in Newark, right?

18 **A.** That's correct.

19 **Q.** And they're there to serve demand to and from New York,
20 right?

21 **A.** That's right.

22 **Q.** Now, in arguing against the inclusion of Newark in the
23 relevant markets, you rely in part on a catchment analysis,
24 right?

25 **A.** That's correct.

1 **Q.** But a catchment analysis is fundamentally an argument
2 based on the location of customers, right?

3 **A.** I think that's an incomplete characterization of the
4 catchment analysis.

5 **Q.** Well, your catchment analysis is explicitly about
6 determining consumer preferences for one airport as compared
7 to another as a function of their residential addresses,
8 correct?

9 **A.** That's correct.

10 **Q.** All right. And, in fact, let's put up slide 84 that you
11 talked about yesterday.

12 MS. NELSON: Don't publish this.

13 MR. WALL: We can't publish this. This has some
14 confidential information. It's in your slide there. You
15 should have it there.

16 THE WITNESS: Can you show me where it is?

17 MS. NELSON: It's in the plaintiffs' binder in the
18 first tab.

19 THE COURT: Thank you.

20 THE WITNESS: And slide 84, you said?

21 MR. WALL: Yes.

22 THE WITNESS: Yes, I see.

23 THE COURT: Hold on one minute. I want to get
24 there, too.

25 Okay. I'm there.

1 MR. WALL: Sorry about the confidentiality issues
2 messing us up for a second.

3 BY MR. WALL:

4 **Q.** In all events, what you put on this, right above the
5 table that's in the lower right hand quadrant is airport
6 choice by residential location, right?

7 **A.** Yes, that's right.

8 **Q.** And then the vertical axis on the chart below is
9 residential location, right?

10 **A.** Yes, that's correct.

11 **Q.** And so these catchment analyses are plainly focused on
12 the location of the customer making the purchase, right?

13 **A.** That would be an incomplete characterization.

14 **Q.** I didn't ask whether it was complete or incomplete. It
15 is plainly focused on that, correct?

16 **A.** No, I disagree.

17 **Q.** Okay. But Section 4.2.1 of the guidelines says that the
18 location of the customer making the purchase should not be
19 used to narrow a market based upon the location of the
20 suppliers, correct?

21 **A.** Could you put the quote back up on the screen? I'd love
22 to.

23 **Q.** "When the geographic market is defined based upon
24 supplier locations, sales made by suppliers located in the
25 geographic market are counted, regardless of the location of

1 the customer making the purchase." Did I read that
2 correctly?

3 **A.** Yes, that's how I've implemented it.

4 **Q.** You've implemented with a catchment analysis that turns
5 on the residential address of the customer?

6 **A.** No, I don't think this is what this statement -- I can
7 explain this to you if you like.

8 **Q.** Your counselor can have you explain it.

9 **A.** Okay.

10 **Q.** Before we turn to what you say of your hypothetical
11 monopolist tests, let's look at another part of
12 Section 4.2.1, which is the last part. And you see it on the
13 screen. It says, "In considering likely reactions of
14 customers to price increases for the relevant products
15 imposed in a candidate geographic market, the agencies
16 considered any reasonably available and reliable evidence,"
17 and there's a list of bullet points. Do you see that?

18 **A.** Yes, I do.

19 **Q.** Okay. And the first one is how customers have shifted
20 purchases in the past between geographic locations in
21 response to relative changes in price or other terms and
22 conditions.

23 **A.** Yes, I do see that.

24 **Q.** Okay. Now, that is referring to what we call diversion,
25 right?

1 **A.** Yes.

2 **Q.** And in this case, diversion among geographies, instead of
3 potentially diversion among products, right?

4 **A.** That's right.

5 **Q.** Okay. Now, you did not conduct any stand-alone study of
6 how customers have shifted purchases in the past between
7 LaGuardia and JFK, on the one hand, and Newark, on the other,
8 in response to relative changes in price or other terms and
9 conditions at those airports, did you?

10 **A.** That would be incorrect.

11 **Q.** What did you do in the way of a stand-alone study of how
12 customers have shifted purchases in the past, between those
13 airlines?

14 **A.** Well, when I looked at the decisions that customers made
15 between 2015 and 2019, within four quarters of each of those
16 years and, you know, with that backstop, analyzing the
17 decisions that they actually made in response to price
18 charges in the market, determined that substitution towards
19 Newark or other sources, other options outside of JFK would
20 be insufficient to constrain the exercise of market power at
21 JFK and LaGuardia.

22 **Q.** Indeed. And you're back to your simulation, right?

23 **A.** Well, the quantification of the diversion comes through
24 the demand model.

25 **Q.** And with, once, again, Newark lumped into the outside

1 good, right?

2 **A.** Which is as appropriate, yes.

3 **Q.** Right. I'm asking you something more specific, sir. Put
4 aside your demand model where Newark is part of the outside
5 good. You did not conduct a stand-alone study of how
6 customers had ever, in the past, shifted purchases between
7 LaGuardia and JFK on the one hand, and Newark on the other,
8 in response to relative changes in price or other terms and
9 conditions at those airports, true?

10 MR. DERITA: Objection. That mischaracterizes what
11 he just testified to.

12 THE COURT: Overruled.

13 THE WITNESS: The answer is that the only source of
14 specifically estimated diversion information comes through
15 the demand model.

16 BY MR. WALL:

17 **Q.** Well, even in your analysis of the 737 MAX grounding, you
18 didn't try to measure diversion from JFK or LaGuardia to
19 Newark, right?

20 **A.** My understanding is that some of the routes that were
21 affected by the 737 MAX grounding, American and JetBlue
22 served them both out of JFK, so it wouldn't be informative on
23 that point. And I think one of the routes on which you saw
24 the price increase, I believe JetBlue operated out of JFK and
25 American operated out of LaGuardia, but I don't remember the

1 details of that.

2 **Q.** My question was a little bit more specific than that.

3 When you did that analysis?

4 **A.** Uh-huh.

5 **Q.** Which you said was informative of a lot of things in this
6 case, you didn't try to determine whether the prices or other
7 terms and condition of service on flights from Newark had
8 changed or not changed at the same time, did you, sir?

9 **A.** My understanding is that the flights that -- that prices
10 of the flights at Newark did increase.

11 **Q.** I'm not asking you what you understand, I'm asking you
12 what you did in your study. You didn't study it, did you,
13 sir? It's not in your 737 MAX study?

14 **A.** The 737 MAX study is focused on the price of JFK after
15 the grounding happened.

16 **Q.** So the answer to my question is that, no, there is
17 nothing in your demand -- in your 737 MAX study that
18 separately considered and identified whether there were also
19 changes at Newark, true?

20 **A.** That's true.

21 **Q.** And the problem that you were dealing with is that the M
22 AX wasn't just grounded at JFK, but throughout the United
23 States, right?

24 **A.** I don't see why this is a problem, as you're
25 characterizing it.

1 **Q.** The MAX was grounded throughout the United States,
2 correct?

3 **A.** Yes, that's my understanding.

4 **Q.** American Airlines was not the only airline flying the MAX
5 at the time, correct?

6 **A.** That's true.

7 **Q.** Southwest was flying the MAX at the time, right?

8 **A.** That's true.

9 **Q.** Southwest was the largest MAX operator in the United
10 States at the time, right?

11 **A.** I don't know the answer to that.

12 **Q.** Southwest had to pull down service at Newark because of
13 the MAX grounding, correct?

14 **A.** That's my understanding.

15 **Q.** Let's go back to Section 4.2.1, the next bullet that is
16 here is, "The cost and difficulty of a customer traveling to
17 a seller's location in relation to its price." You did not
18 study that, either, did you?

19 **A.** I think this comes through the choice behavior of the
20 customers as I observed in making choices with a number of
21 the different datasets that I've looked at.

22 **Q.** In fact, as we've discussed in your deposition, you
23 present results from your merger simulation and your
24 hypothetical monopolist tests that predict price increases
25 far greater than the cost to an individual, let alone a

1 family, of getting in a cab or an Uber to take a Newark
2 flight, rather than a more expensive LaGuardia or JFK flight,
3 correct?

4 **A.** I haven't analyzed the price of a taxi or an Uber from
5 one airport to the other.

6 **Q.** Right. But the cost and difficulty of a customer
7 traveling to a seller's location in relation to price in this
8 industry is fundamentally about how much time and money it
9 would cost you to get to an airport that maybe is a little
10 further away, right?

11 **A.** Well, I think that would -- you're focused on cost, but
12 we can also think about difficulty and what that entails in
13 terms of how consumers make decisions, and there's a host of
14 considerations are gonna -- we can just conceptualize of
15 driving customer choice here, but it would include the cost
16 of a taxi, but also the opportunity cost of time, and also
17 preferences for airports for other reasons, or particularly
18 there are carriers that operate out of particular airlines
19 for one reason or another. So all of that I think is bundled
20 up in this notion of cost and difficulty, and that shows up
21 in the choices the passengers make that I've been able to
22 analyze in the data.

23 **Q.** Okay. For example, one of the things that could
24 influence them is what their loyalty is to different
25 airlines, right?

1 **A.** That's possible.

2 **Q.** So if I am out there in San Francisco and I have to
3 choose between Newark and JFK, I might choose to fly to
4 Newark because I'm a member of the United loyalty program,
5 right?

6 **A.** Yes, you might.

7 **Q.** Or I might decide to fly to JFK because I'm a member of
8 the JetBlue TrueBlue program, right?

9 **A.** That's a possibility, yes.

10 **Q.** In all events, let's just assume that a consumer -- let's
11 take a New York consumer, and assume they live in Tribeca.
12 And I will represent to you that an Uber to JFK costs about
13 \$63 from Tribeca and an Uber to Newark costs about \$65. So
14 the incremental cost to get from Newark to JFK is about \$2.
15 Can you make that assumption for me?

16 **A.** Okay. I don't know where Tribeca is, but I don't think I
17 need to for this example.

18 **Q.** Okay. It's in Manhattan.

19 Okay. And let's say in this particular case we're
20 talking about a family of five that want to fly to Los
21 Angeles to visit relatives and maybe go to Disneyland. Okay?

22 **A.** Okay.

23 **Q.** Now, let's pull up PX1018, which is in Exhibit 14 from
24 your report, on hypothetical monopolist tests for NEA nonstop
25 overlap markets. Right?

1 **A.** Yes, that's right.

2 **Q.** And if we go down to the line, marked below there,
3 "Markets with New York endpoint" and get down to where LA
4 is. You're saying that the hypothetical monopolist would
5 raise ticket prices by 63 to 76 percent if American was the
6 hypothetical monopolist and 97 to 131 percent if JetBlue was,
7 right?

8 **A.** That doesn't seem right to me.

9 **Q.** Let me say it again here. I think I actually misspoke.
10 I'm sorry.

11 You're saying that the range of increases would be
12 63 to 76 percent on American Airlines products, and 97 to
13 131 percent on JetBlue products, right?

14 **A.** I don't see the column headers, but I don't have reason
15 to think that's incorrect.

16 **Q.** Okay. So that would be hundreds of dollars per ticket,
17 right?

18 **A.** I haven't looked at the -- the price on those flights.

19 **Q.** Well, assume it is.

20 **A.** Yeah, that's right. If it's \$200, we're arguably there,
21 so that seems -- that seems accurate.

22 **Q.** Okay. So what you're asking Judge Sorokin to believe is
23 that your hypothetical monopolist could actually do that,
24 even though for millions of New Yorkers, the incremental cost
25 of flying out of Newark, if any, is a fraction of the

1 predicted price increase?

2 **A.** You know, as I've already mentioned, when you have such
3 an extreme loss of competition, the interpretation of the
4 model is somewhat stressed, and in this particular instance,
5 we're losing the competition between Delta and JetBlue.

6 **Q.** Fair point.

7 **A.** And American. You know, everybody who flies out of JFK
8 and LaGuardia. And quantifying the substitution patterns and
9 accounting for folks that switch to Newark, the loss of that
10 competition is important. Now, when you get price tags that
11 are this big, I don't want to testify that this is exactly
12 what will happen, what I can say is that this is a
13 substantial loss of competition. And compared to the
14 thresholds that are set up in the merger guidelines, which
15 are 5 to 10 percent for a SSNIP, it easily exceeds that
16 level.

17 **Q.** Do you think it would at least be a reasonable test to
18 see whether the same dynamic applies to your predicted price
19 increases based upon the simulation?

20 **A.** And what do you mean by that?

21 **Q.** Yeah, if you're predicting, let's say \$100 increase in
22 price from your simulation on your route, and the incremental
23 cost to get to Newark was five dollars, would you think that
24 that was a sustainable competitive equilibrium?

25 **A.** I don't think the relative cost per Uber in a particular

1 place in Manhattan is relevant for the question of demand
2 estimation and the results that I obtained from that, and the
3 reason is that it's focusing on one particular location and
4 the model accounts for consumers that are all over. And
5 further more, you're focused on one component of how
6 customers might make their decision, rather than all the
7 things that might matter for customers. And that's what my
8 analysis does.

9 **Q.** But --

10 MR. DERITA: Objection, he's interrupting the
11 witness.

12 MR. WALL: I thought he was done. Sorry.

13 BY MR. WALL:

14 **Q.** But to be fair, sir, the one factor that we're talking
15 about is the factor that the Department of Justice
16 specifically called out in Section 4.2.1 of the guidelines,
17 the cost and difficulty of a customer traveling to a seller's
18 location in relation to its price, right?

19 **A.** Well, the cost, but then I think difficulty is much
20 broader on that.

21 **Q.** One more bullet on 4.2.1 I want to cover. That's the one
22 that says, "Evidence on whether sellers base business
23 decisions on the prospect of customers switching between
24 geographic locations in response to relative changes in price
25 or other competitive variables." Do you see that one?

1 **A.** Yes, I do.

2 **Q.** Now, you've certainly seen evidence about that one,
3 haven't you?

4 **A.** Yeah, I reported some on it yesterday, and I described
5 more ON the report that I could described, if you'd like.

6 **Q.** Right. Well, one piece of evidence is that the Northeast
7 Alliance is, itself, based on the prospect of customers
8 switching between United's services at Newark, in response to
9 the increase in New York relevance that JetBlue and American
10 can obtain through the NEA, right?

11 **A.** I don't want to testify as to why American and JetBlue
12 are doing NEA. That seems beyond the scope.

13 **Q.** Well, let's take a look at defense Exhibit 41. You're
14 familiar with this document, aren't you?

15 **A.** I've read a lot of documents. I don't recall all of
16 them.

17 **Q.** Well, then I'll just represent to you that these were
18 slides that were presented to the board of directors of
19 American Airlines having to do with the NEA, and I'm going to
20 ask to have page 65 put up here. Even though I know you read
21 a lot of documents, do you at least remember this one?

22 **A.** Yeah, I think it may have even come up in testimony
23 earlier.

24 **Q.** Yes. And it states, "A combined network creates a new
25 ability to compete with Delta and United," correct?

1 **A.** That's the title of the slide.

2 **Q.** Right. And the data for United that are presented in the
3 slide are data that can only be true if you're counting the
4 United operations at Newark, correct?

5 **A.** The -- um -- it does say that it's counting New York
6 City, it's included New York, JFK, and LaGuardia together in
7 the top left.

8 **Q.** Right. And so this would be an example, then, of what
9 the guidelines call evidence on whether sellers base business
10 decisions on the prospect of customers switching between
11 geographic locations in response to relative changes in price
12 or other competitive variables, right?

13 **A.** That's not obvious to me. I don't see an analysis of how
14 customers make decisions on this slide.

15 **Q.** No, this is an analysis about how sellers think that they
16 can obtain more business, right?

17 **A.** What I see in this slide is just a summary of how many
18 routes that are going to fly out of the New York metropolitan
19 area.

20 **Q.** Look at the title, a combined New York -- excuse me, a
21 combined network creates a new ability to compete with Delta
22 and United. Do you see that?

23 **A.** Yes, I do.

24 **Q.** Now, compete for customers, right? That's what they
25 compete for.

1 **A.** That makes sense to me.

2 **Q.** Okay. All right. So you place the most emphasis on your
3 Hypothetical Monopolist Test, let's turn to that.

4 In fact, you haven't done a Hypothetical Monopolist
5 Test as envisioned by the *Horizontal Merger Guidelines*, have
6 you, sir?

7 **A.** I think that's correct. And also I think you
8 mischaracterized what I put the most emphasis. I think I
9 provided you with -- provided a range of analyses that are
10 all consistent with each other.

11 **Q.** Okay. Sorry about that. I'll withdraw that statement.
12 But you agree, it's correct that you haven't done a
13 Hypothetical Monopolist Test as envisioned by the *Horizontal*
14 *Merger Guidelines*?

15 **A.** No, I think that would be incorrect.

16 **Q.** Well, the transcript, just, we should note, it was taken
17 down that you said that's correct, but you've clarified, so
18 we can move on.

19 Now, the hypothetical --

20 THE COURT: Just the question.

21 THE WITNESS: Maybe I got turned around on the
22 question. Can you say the question so that I can --

23 MR. WALL: I think it's clear now. I think you
24 cleared it up. But when you first answered my question, you
25 said I think that's correct.

1 THE WITNESS: Well, let's make sure I got the
2 answer right, if I answered two different ways.

3 What's the question?

4 BY MR. WALL:

5 **Q.** You haven't done a Hypothetical Monopolist Test as
6 envisioned by the *Horizontal Merger Guidelines*, have you?

7 **A.** That's incorrect. I have done a Hypothetical Monopolist
8 Test as envisioned by the *Horizontal Merger Guidelines*.

9 **Q.** Okay. So the Hypothetical Monopolist Test is an exercise
10 by -- where one assumes that the hypothetical profit
11 maximizing firm that was the only present and future producer
12 of the relevant product located in the region imposes
13 something called a small but significant nontransitory
14 increase in price, right?

15 **A.** That's correct.

16 **Q.** Okay. And a typical SSNIP, as you just mentioned, is
17 usually on the order of 5 to 10 percent, right?

18 **A.** That's correct.

19 **Q.** And the guidelines state, in Section 4.2.1 that, quote,
20 "In this exercise, the terms of sale for all products
21 produced elsewhere are held constant," end quote, right?

22 **A.** That's correct.

23 **Q.** Okay. Now, the starting point for the Hypothetical
24 Monopolist Test is the areas in which the merging firms
25 compete, respecting each relevant product, correct?

1 **A.** It's where the products are offered. So this would be
2 JFK and LaGuardia in this instance.

3 **Q.** But this is a market that is based upon the location of
4 suppliers in which it is presumed that customers will travel
5 to where the supply is offered, correct?

6 **A.** Yes, the location of the suppliers in my candidate market
7 are in JFK and LaGuardia.

8 **Q.** And their customers are based throughout the New York
9 metropolitan region, right?

10 **A.** That's right.

11 **Q.** Okay. And so are you familiar with the publication by
12 the Federal Trade Commission and the Department of Justice
13 called "Commentary on the *Horizontal Merger Guidelines 2006*"?

14 **A.** Yes, I am.

15 **Q.** Okay. I want to put up something from that which is in
16 the section that discusses geographic market definition. And
17 it says, quote, "Thus, for geographic market definition, the
18 agencies begin with the areas in which the merging firms
19 compete, respecting each relevant product, and extend the
20 boundaries of those areas until an area is determined within
21 which a hypothetical monopolist would raise prices by at
22 least a small but significant and nontransitory amount."

23 You're familiar with that rule?

24 **A.** I would not characterize it as a rule, and in fact, I
25 think the language on this is updated in the 2010 *Horizontal*

1 *Merger Guidelines*, and hard to to get away from the strictly
2 algorithmic approach, which would lead to sort of confusing
3 and unhelpful conclusions.

4 **Q.** Well, thank you for mentioning that because what actually
5 happened is that, after 28 years in which the Hypothetical
6 Monopolist Test was described this way, where the -- that the
7 SSNIP test would extend the boundaries of a market that were
8 defined by where firms were competing, the 2010 guidelines
9 changed that, so you could actually narrow the market
10 relative to whether -- where firms were actually competing,
11 correct?

12 **A.** I don't know --

13 MR. DERITA: Objection. He's testifying.

14 MR. WALL: If he is an expert on this.

15 THE COURT: Overruled.

16 MR. WALL: He is entitled to it.

17 THE WITNESS: Your question asked me to opine why
18 the 2010 guidelines were revised. I think --

19 THE COURT: No, not why. How. I know he asked
20 why.

21 THE WITNESS: No, he said why. That's why I'm
22 pointing this out. I don't know why. He said that they did
23 this in order to do this. That was the question.

24 BY MR. WALL:

25 **Q.** I didn't mean purpose. I meant to facilitate, in a

1 manner that permits one to narrow the market relative to the
2 area in which firms are competing?

3 **A.** No, it's whether you use the strict algorithm that's here
4 on the screen, or whether one uses the approach of the 2010
5 guidelines, it's not obvious that's -- which would lead to
6 more narrow or more broad markets, but the revisions of
7 the 2010 guidelines were meant to align market definition
8 with --

9 THE COURT: I guess I'm not interested in what
10 they're meant to do, but what they do do.

11 THE WITNESS: What they do do is they align the
12 concept of market definition with the economic forces that
13 matter for suppliers. And so that, you know, I align my
14 analysis quite precisely with the 2010 guidelines, which is,
15 you know, the most recent set of guidelines provided by the
16 Department of Justice, and the Federal Trade Commission.

17 BY MR. WALL:

18 **Q.** Indeed, and for that reason, you do not align your
19 analysis with the principle that's on the screen from the
20 2006 commentary that one begins with the areas in which the
21 merging firms compete and extend the boundaries of those
22 areas, based upon the SSNIP test.

23 **A.** Well, it's not quite accurate. I did start with
24 LaGuardia and JFK, and then I conducted the SSNIP test, and I
25 determined that they're -- you know, if you lost all the

1 competition that existed at LaGuardia and JFK, including
2 Delta and American and JetBlue and everybody else, that in
3 the local markets that we're looking at, the overlap markets,
4 you would pass the SSNIP test. And so in that sense, this is
5 consistent with my approach.

6 **Q.** But you're starting point for your SSNIP test already
7 presumes that there isn't competition from flights at Newark,
8 correct?

9 **A.** No, that's incorrect. That's the purpose of the test is
10 to determine how important that competition is.

11 **Q.** I didn't ask you how important it is, what I'm asking you
12 is whether it exists. The language here is: "The agencies
13 began with the areas in which the merging firms compete." It
14 doesn't say anything more than that. Does it?

15 **A.** Right. So I'm starting with JFK and LaGuardia.

16 **Q.** But they compete for more than just JFK and LaGuardia, do
17 they not?

18 **A.** Those are the products, are JFK and LaGuardia.

19 **Q.** And --

20 MR. DERITA: Objection, Your Honor.

21 THE COURT: What's the objection?

22 MR. DERITA: He keeps interrupting the witness.

23 THE COURT: Are you finished?

24 THE WITNESS: No, I'm trying to explain that the
25 products that American and JetBlue offer, predominantly, are

1 out of LaGuardia and JFK, and so as I define a candidate
2 market, I start there. And then I ask the question, I want
3 to test whether this candidate market is -- satisfies the
4 Hypothetical Monopolist Test. In other words, when they ask
5 that question, we ask, are options outside of this market
6 sufficiently good substitutes to constrain the exercise of
7 the market power. So you start with a candidate market based
8 on the location of competition between American and JetBlue.
9 That's why I've done this based on JFK and LaGuardia, and
10 then I test whether other options are sufficiently good for
11 customers.

12 **Q.** Well, let's be clear, if you run the Hypothetical
13 Monopolist Test, based upon this standard, beginning with the
14 areas in which the merging firms compete, and that includes
15 Newark, it also passes the Hypothetical Monopolist Test,
16 right?

17 **A.** Yeah. And I mentioned this on direct. Actually, did I
18 run that test? It would pass. It would pass. If you also
19 reduce competition out of Newark, the price elevations would
20 be even higher than what I report in my analysis. So I
21 agree, that if you did all three together, it would also pass
22 the Hypothetical Monopolist Test.

23 **Q.** In fact, for the vast majority of routes, LaGuardia alone
24 passes the Hypothetical Monopolist Test, doesn't it?

25 **A.** I put in a declaration or either a supplemental statement

1 on that. If you have it, I could review.

2 **Q.** I actually don't want to take the time to do that, but
3 it's fair to say that what you did is you responded to
4 analysis by Dr. Israel showing that on the vast majority of
5 routes, LaGuardia would pass the Hypothetical Monopolist Test
6 by itself?

7 **A.** I would want to look at the analysis to -- so I don't
8 mischaracterize Dr. Israel, I don't think it would be
9 appropriate to define a market based only on LaGuardia.

10 **Q.** Okay. But the point is is that the Hypothetical
11 Monopolist Test can't tell us that the two airport market is
12 the only right market, because the three airport market also
13 passes the Hypothetical Monopolist Test?

14 **A.** The guidelines give us a way for thinking about which
15 market to choose when multiple markets pass the Hypothetical
16 Monopolist Test, and that's something I went over in my
17 direct.

18 **Q.** Right. And what that standard is that at that point the
19 tiebreaker is which market best illuminates the competitive
20 effects of the transaction, right?

21 **A.** That's correct.

22 **Q.** So your argument is that in choosing the relevant market
23 that most illuminates the competitor effects of the Northeast
24 Alliance, Judge Sorokin should disregard competition from
25 United at Newark.

1 **A.** I think it's important to understand that the competition
2 from United to Newark exists and my model accounts for that.
3 For the purposes of market definition and market share, it's
4 not sufficient to constrain at JFK and LaGuardia. Therefore,
5 it does not belong in the relevant market.

6 **Q.** Okay. I want to finish our discussion on market
7 definition by addressing some of the things you said about
8 whether this matters or not.

9 You wrote 40 pages in your original report on
10 market definition, right?

11 **A.** I don't remember the precise number.

12 **Q.** You wrote another 18 pages in your reply report, right?

13 **A.** I don't know the number.

14 **Q.** And let's take a look at an exhibit that you've seen
15 before in your deposition, that is a side by side comparison
16 of Exhibit 16 from your report, which is PX1020, and
17 Defendants' Exhibit 1040 from Dr. Israel's supplemental
18 submission. You're familiar with this, right?

19 **A.** Yeah, I vaguely remember it.

20 **Q.** Okay. And you see that it compares your analysis of HHIs
21 and modified HHIs without Newark, to an updated analysis of
22 concentration that includes Newark, right?

23 **A.** That's correct.

24 **Q.** Okay. So let's just look at what happens to market
25 shares. For San Francisco, a claimed 45.7 percent combined

1 market share drops to 24.9 percent, right?

2 **A.** That's correct.

3 **Q.** That's a 45 percent reduction in the combined share,
4 right?

5 **A.** I don't know.

6 **Q.** There is a 40 percent reduction of market share on the
7 Las Vegas route, right?

8 **A.** The numbers go from 46.5 to 27.9 on this sheet.

9 **Q.** There's a 28.5 percent reduction in the combined shares
10 on LAX, right?

11 **A.** You're asking me to do math in my head that I'm not
12 prepared to do, but I do see a reduction from 57 to 40.

13 **Q.** For all but six routes with a New York -- with New York
14 City as an endpoint, the change in the HHIs for both the
15 standard and the modified versions of the HHIs is now below
16 500. Right?

17 **A.** Yes, I don't know why 500 is a relevant metric here.

18 **Q.** Well, I'll just ask you, when was the last time that you
19 were aware of that either the antitrust division or the
20 Federal Trade Commission challenged any merger where the
21 highest change in the HHI for any relevant market was less
22 than 500?

23 **A.** I'm just going by what the guidelines say. I don't
24 follow, actually, litigation that the Department of Justice
25 and the Federal Trade Commission do on a routine basis.

1 **Q.** The contours of the geographic markets in New York, and
2 particularly where Newark flights are included, directly
3 effects the HHIs and the modified HHIs by which you infer a
4 likelihood of adverse effects, correct?

5 **A.** I'm sorry. Say this again?

6 **Q.** Well, let me put it this way, in your simulation, when
7 you're modeling this recapture effect, diversion is
8 proportional to market share, right?

9 **A.** No, that's not true.

10 **Q.** How is that not true?

11 **A.** The -- I use nests, again, to allow for diversion of the
12 outside good, to relax the substitution patterns there, in a
13 way that makes sense, allows for flexibility. I also allow
14 for different preferences for nonstop and connect, and all of
15 this -- all of this captures the -- helps me capture the real
16 decision that customers are making, and summarize it in a
17 useful way.

18 Now, it is the case that the diversion I get is
19 going to correlate with market shares, but that should also
20 be consistent with expectation for reasons that I outlined
21 yesterday on direct.

22 **Q.** Okay. Let's just go, then, with diversion is going to
23 correlate with market shares.

24 So if the market shares change, it's going to
25 change the results of the model, right?

1 **A.** Not necessarily. What matters is the choices that people
2 make, and the model will pick up the choices that people
3 make.

4 **Q.** Okay. Let's take a look at this document related to your
5 Exhibit 25, you've seen at your deposition, also. It's based
6 on plaintiffs' Exhibit 1029 and the back up material that you
7 provided us specifically, "Work paper 4" from your reply
8 report. And you recall this, right?

9 **A.** Not specifically.

10 **Q.** Okay. But it's showing how your predicted price
11 increases change when Newark is included in the relevant
12 markets, right?

13 **A.** That's -- there's nuance and one has to be careful with
14 the interpretation of this. Because if we put Newark into
15 the market without accounting for what I observe, which is
16 that Newark is a relatively distant substitute, if we don't
17 allow the model to -- if we just assume, essentially, that
18 Newark products are equally as good as all the other
19 products, then this is what will come out.

20 **Q.** Okay. Fair enough.

21 **A.** That's a very strong assumption that's actually
22 inconsistent with the sorts of evidence that I've been able
23 to provide.

24 **Q.** Okay. But going with that, what -- the effect of doing
25 this is that the predicted price increases decline

1 substantially, right?

2 **A.** I don't want to use the adjective --

3 **Q.** Fair enough.

4 **A.** -- but if you were to incorrectly include Newark as an
5 equal competitor for the same customers that normally do
6 JetBlue or American, mechanically the price effect is going
7 to go down.

8 **Q.** Okay. So let's look at Miami, first one. The -- the
9 price increase that your model predicts for all products is
10 10.2 percent, right?

11 **A.** That's correct.

12 **Q.** If you don't count Newark. If you count Newark,
13 mechanically, however you want to put it, it drops to
14 6.5 percent, right?

15 **A.** In -- again, this makes sense mechanically, yes.

16 **Q.** Okay. So it drops almost 37 percent, once we account for
17 Newark competition, right?

18 THE COURT: And the difference in those two is in
19 the second, the 6.5 percent, Newark is assumed to be an equal
20 or so-called perfect substitute for JFK and LaGuardia?

21 THE WITNESS: There's two things going on. One is
22 that with overstating -- I'll just say it, with more
23 diversion flowing to the United products out of Newark,
24 which, because they're an equal competitor, it will just put
25 in a lot of diversion that goes to United, that will tend to

1 reduce upward pricing pressure, so that the magnitude of --

2 THE COURT: Sure. But the thing that changes
3 between these two outcomes is the assumption that Newark is
4 an equal substitute.

5 THE WITNESS: There's one other change, which is
6 that -- I explained yesterday that the price -- the prices of
7 firms, other than American and JetBlue, are allowed to
8 increase, with the NEA, but that that effect tends to be much
9 smaller than the price elevations that you see on JFK and
10 American. And so here, when you're going for all products,
11 not only do you reduce the price effect of JFK -- of American
12 and JetBlue, but you also add in United and so bigger -- you
13 know, the United is going to have the smaller price
14 elevation, because it's not one of those firms. It's not --
15 and so we're adding in sort of a small number. So the
16 average across all products comes down for both of those
17 reasons.

18 BY MR. WALL:

19 Q. Right. So overall, we did go through the specifics of
20 this in briefing or what have you, but overall, what occurs
21 on the New York routes is that the predicted harm on the New
22 York routes drops 30 percent once flights from Newark are
23 treated the same way in the model as flights from LaGuardia
24 and JFK.

25 A. Yeah, I think -- and that's the 70 million number that I

1 showed yesterday.

2 **Q.** Right. And in that 30 percent drop in the estimated harm
3 occurs even though the volume of traffic captured in your
4 simulation, once you treat Newark as part of the market,
5 increases by over 80 percent, right?

6 **A.** I don't understand why the volume of traffic is relevant
7 to this. 70 million is the same number, either way.

8 **Q.** The volume -- you said it yesterday in your testimony,
9 that your estimates of overcharge are sensitive to the volume
10 of traffic affected, right?

11 **A.** If you'd like me to take a stab at explaining, I can.

12 **Q.** Never mind. But do you -- regardless of whether you
13 think it matters or not, do you dispute the fact that once
14 you put in all of that capacity, and all of that flying from
15 Newark, the size of the relevant market -- relevant markets,
16 in the aggregate, increases by over 80 percent?

17 **A.** That's not a number that I've looked into. But
18 mechanically it would go up, because you're adding in traffic
19 from United and other carriers outside, out of Newark.

20 **Q.** Okay. And in all events, Dr. Miller, what you do with
21 your market shares is you try to apply the presumptive
22 illegality of the *Horizontal Merger Guidelines* to them,
23 right?

24 **A.** I don't apply that. I just analyze the numbers.

25 **Q.** Okay. Well, let's just then look at your slide 72, and

1 the lower bullet. And it says, "Collaboration guidelines
2 explain that measures of market shares and concentration are
3 relevant to assessing a collaboration." Under that it says,
4 "Herfindahl-Hirschman Index, HHI, is the standard of measure
5 of concentration," and under that, you say, "*Horizontal*
6 *Merger Guidelines* for markets with post-merger HHI greater
7 than 2,500 and a change in HHI greater than 200, a merger
8 will be presumed to be likely to enhance market power."

9 Right? You put that in your slide?

10 **A.** Yeah. To be clear, I'm clarifying the instances in which
11 the guidelines state and the Justice Department and the
12 Federal Trade Commission will presume a likelihood of
13 enhanced market power.

14 **Q.** Right.

15 **A.** To clarify what I said earlier, you know, I don't
16 necessarily presume that. I try to look at a full analysis,
17 but I'm just characterizing what's in the merger guidelines.

18 **Q.** Okay. That's a merger standard from the *Horizontal*
19 *Merger Guidelines*, right?

20 **A.** That is correct.

21 **Q.** There is no presumption of illegality or an
22 anti-competitor effect based on market shares in the
23 collaboration guidelines, is there?

24 **A.** The collaboration guidelines?

25 **Q.** Answer my question, yes or no.

1 **A.** It is not a yes or no question.

2 **Q.** Yes it is a yes or no question. Please answer it yes or
3 no. Is it there or is it not?

4 **A.** It depends on the --

5 THE COURT: Well, he can either answer it yes or
6 no, or say he can't.

7 THE WITNESS: Okay. I can't answer that question.

8 BY MR. WALL:

9 **Q.** Okay. In fact, the collaboration guidelines are very
10 clear on the degree to which merger analysis applies and does
11 not apply with respect to collaborations, are they not?

12 **A.** They provide -- are they not? Are they very clear? They
13 provide a discussion of situations under which a
14 collaboration is appropriate to analyze as a merger.

15 **Q.** Let's look at Section 3.3 of the collaboration
16 guidelines. "In evaluating the significance of market share
17 and market concentration data, and interpreting the range of
18 market share as ascribed to the collaboration, the agencies
19 also examine factors beyond those set forth in the *Horizontal*
20 *Merger Guidelines.*"

21 You're familiar with that principle?

22 **A.** Yes, I've read these guidelines.

23 **Q.** Okay. And the first factor mentioned in Section 3.3.4,
24 we can put that up, is --

25 **A.** Do you actually have this in the binder, by the way? Can

1 I look at it?

2 MS. NELSON: It's the second to the last tab in the
3 big binder.

4 THE WITNESS: I'm sorry to interrupt.

5 Okay. Sorry.

6 Q. Okay. Section 3.3.4?

7 A. Uh-huh.

8 Q. "Competitor collaborations sometimes do not end
9 competition among the participants in a collaboration.
10 Participants may continue to compete against each other and
11 their collaboration, either through separate independent
12 business operations or through membership and other
13 collaborations." It goes on a little later, "Control over
14 key on competitive variables may remain outside the
15 collaboration, such as where the participants independently
16 market and set prices for the collaborations output." That's
17 what the guidelines state, right?

18 A. Yes, I do read this.

19 Q. And this is just making a point that you just can't use
20 concentration data as if there's a merger when the
21 collaboration preserves some ability to compete
22 independently, right?

23 A. Yes. And I think that the following paragraph contains
24 some lists of things that matter for this.

25 Q. And we'll come to them. Thank you.

1 Furthermore, you are aware, are you not,
2 Dr. Miller, that merger analysis, under Section 7 of the
3 Clayton Act occurs subject to a legal rule called the
4 *Philadelphia National Bank* that creates an presumption of
5 anticompetitive effects from a substantial increase in
6 concentration?

7 **A.** I'm not aware of the case law.

8 **Q.** Okay. Now, in a case of a collaboration, the market
9 shares by the terms of the collaboration guidelines are
10 relevant to the question of whether the participants to the
11 collaboration will have enough control of supply in the
12 market to raise prices by restricting their own output,
13 correct?

14 **A.** Are you asking me to endorse a quote from the
15 collaboration guidelines, or just --

16 **Q.** Just pull it up. Let's pull up collaboration guidelines
17 3.3. It says, "Other things being equal, market share
18 affects the extent to which participants or the collaboration
19 must restrict their own output in order to achieve
20 anticompetitive effects in a relevant market. The smaller
21 the percentage of total supply that a firm controls, the more
22 severely it must restrict its own output, in order to produce
23 a given price increase, and the less likely it is that an
24 output restriction will be profitable."

25 Do you agree with that statement?

1 **A.** Yes, I think if this were being written out, it would be
2 worded a little differently, but I do agree that the market
3 share is relevant for understanding the potential market
4 power.

5 **Q.** But in your analysis in this case, you never reported on
6 any findings about whether the NEA would give American and
7 JetBlue sufficient market share to restrict their own output
8 in order to produce a price increase, did you?

9 **A.** No, I disagree with that statement. I have done this.
10 This is part of the language that I think would be updated,
11 because this is sort of done in the context of a commodity
12 market where you can reduce your output and retain a higher
13 price. But with differentiated products, it's more as if
14 there's a question of can you raise price and not lose output
15 to such an extent to make the price increase unprofitable,
16 and that's what I've explored. It's sort of the analog to
17 this statement.

18 **Q.** But the way that you approached market power in this case
19 was by presenting, in your report, and in your slides
20 yesterday, an analysis of HHIs and modified HH Is relating
21 them to the threshold for presumptive illegality under the
22 *Horizontal Merger Guidelines*, right?

23 **A.** I've done a lot to look at the implications of the NEA
24 for market power, and one of the exercises that I've done was
25 an analysis of the Herfindahl-Hirschman Index.

1 **Q.** And in your testimony, you focused on a minority of the
2 markets in which American and JetBlue happened to have the
3 highest market shares of all of the routes that are within
4 the scope of the NEA, right?

5 **A.** In the sense that I focused on the nonstop overlap
6 routes?

7 **Q.** No, you focused on a minority of the nonstop overlap
8 routes, a small minority of the nonstop overlap routes,
9 correct?

10 **A.** Maybe you can refresh my memory on that.

11 **Q.** Well, let me just ask you this. Let's put up slide 43
12 from my opening statement. Do you remember this slide?

13 **A.** Not specifically.

14 **Q.** Well, the first point is that of the 64 destinations with
15 nonstop service by the parties at the time of the NEA to and
16 from Boston, only 12 were nonstop overlaps. Are you aware of
17 that?

18 **A.** Is this characterizing overlaps as they existed in 2019?
19 I believe I have analyzed all the overlaps as they existed in
20 2019.

21 **Q.** Indeed you did. So is it the case, then, sir -- can
22 you -- do you have any basis to disagree with this assertion?

23 **A.** I don't know what this -- precisely, what this assertion
24 is.

25 **Q.** Of the 64 destinations with nonstop service by the

1 parties to and from Boston prior to the NEA, only 12 were
2 nonstop overlaps?

3 **A.** I don't recall the -- no, I don't have a particular
4 reason to disagree.

5 **Q.** Okay. And you do know that six of the 12 Boston nonstop
6 overlaps are the carve-out routes, right?

7 **A.** Yes, that's correct.

8 **Q.** On which there is no revenue sharing or capacity
9 coordination, right?

10 **A.** Yes, that's correct.

11 **Q.** Okay. And you do know that among the remaining Boston
12 overlaps are the Miami, Los Angeles, and Chicago routes,
13 right?

14 **A.** I believe that's the case.

15 **Q.** Okay. Now, let's put up slide 54 from my opening that
16 talked about the position of United and Delta on New York
17 routes.

18 Are you familiar with this slide?

19 **A.** Not specifically.

20 **Q.** Well, do you have any reason to dispute that on the
21 routes that are listed here, the predominant market shares
22 come from some combination of United and Delta?

23 **A.** That seems right. I just want to point out that on my
24 slides, that look similar to this, blue would be JetBlue, and
25 red would be American, and here I see United in blue and

1 Delta in red, so just I don't want to have any confusion on
2 that point.

3 **Q.** Okay. And do you recall that in my opening statement, I
4 made the point that on 81 of the 99 New York City nonstop
5 routes served prior to the NEA by either American or JetBlue,
6 American and JetBlue did not have competing nonstop service?

7 **A.** I don't remember your opening statement.

8 **Q.** All right. Do you have any reason to doubt that on 81 of
9 99 of the New York City nonstop routes served by -- prior to
10 the NEA by either American or JetBlue, they weren't even
11 competitors, nonstop competitors?

12 **A.** The assertion is that they fly a lot of nonstop routes on
13 which they're not competitors.

14 **Q.** Yeah.

15 **A.** That sounds right to me.

16 **Q.** Okay. All right. So if we're going to treat the NEA
17 like a merger analysis, the 2010 merger guidelines would
18 spell out what you should consider, right?

19 **A.** Yes, it does.

20 **Q.** Okay. And, in fact, yesterday you cited Section 6.1 of
21 the merger guidelines as a basis for the simulation that you
22 ran, right?

23 **A.** Yeah. 6.1 explains upward pricing pressure. It doesn't
24 use that term, but it's the economics behind it.

25 **Q.** Right, but it also mentions the possibility of using a

1 merger simulation in an analysis of a differentiated products
2 merger, right?

3 **A.** It does mention that possibility.

4 **Q.** Okay. Now, if we were going to go down the path of
5 analyzing the NEA like a merger, the guidelines would tell us
6 to look at different kinds of evidence, right? Not just HHIs
7 and market shares and things like that.

8 **A.** I think the guideline points out that the types of
9 evidence that are available in investigation are myriad, and
10 provides some ideas for which information might be
11 informative. And in that context, the answer would be yes.

12 **Q.** Okay. So let's look at Section 2.1.1 of the 2010
13 guidelines, which is entitled, "Actual effects observed in
14 consummated mergers." And it states, "When evaluating a
15 consummated merger, the ultimate issue is not only whether
16 adverse competitive effects have already resulted from the
17 merger, but also whether such effects are likely to arise in
18 the future, and then evidence of observed post-merger price
19 increases or other changes adverse to customers is given
20 substantial weight."

21 Do you see that?

22 **A.** I do see that.

23 **Q.** Okay. You provided no analysis of observed postNEA price
24 increases or other changes adverse to customers, did you?

25 **A.** That's correct.

1 **Q.** Okay. Now, let's look at Section 2.1.2, which is direct
2 comparisons based on experience. You're familiar with that?

3 **A.** Yes.

4 **Q.** And this reads, "The agencies will look for historical
5 events or natural experiments that are informative regarding
6 the competitive effects of the merger. For example, the
7 agencies may examine the impact of recent mergers, entry,
8 expansion, or exit in the relevant markets. Effects of
9 analogous events in similar markets may also be informative."
10 Right?

11 **A.** Yes.

12 **Q.** Okay. And one of the things that you could have done in
13 this case to inform the analysis of the NEA is look at what
14 the economic literature or what your own study might have
15 found with respect to the consumer welfare effects of
16 international airline alliances, right? That's a similar
17 kind of transaction.

18 **A.** Well, it's not one that I had looked into much. And
19 Professor Town highlighted a number of reasons to think that
20 this is actually not very comparable. So I'm not sure that
21 that would be informative for the economic effects of the
22 NEA.

23 **Q.** Well, they are different in the sense that the
24 international alliances coordinate prices and have full
25 antitrust immunity, right?

1 **A.** That's my understanding -- I believe that's the case.
2 They can coordinate on prices.

3 **Q.** Okay. So you'd have to make some adjustment for the fact
4 that the NEA doesn't have price coordination or antitrust
5 immunity if you would try to apply those lessons here, right?

6 **A.** Those aren't the differences that may be most relevant.

7 **Q.** But they all involve revenue sharing, right?

8 **A.** That's true. I think. -- I shouldn't, actually -- I
9 shouldn't testify to that fact. My understanding is that
10 they do.

11 **Q.** Well, you're aware of the fact that to get antitrust
12 immunity from the Department of Justice, an international
13 alliance has got to have revenue sharing or some other
14 similar profit sharing function?

15 **A.** It's a regulatory detail that I haven't looked into.

16 **Q.** In your -- wait. In your analysis of the incentive
17 effects of revenue sharing, you never looked at what the DOT
18 has done on that issue in the past?

19 **A.** That's not what I am saying. I'm aware that the DOT
20 approves alliances in this context, but you asked me a
21 question about whether there's a particular thing that is
22 needed for approval and that's not something that I should
23 testify to.

24 **Q.** Okay. Are you aware, then, of the fact that there's a
25 substantial body of DOT decisions approving ATI applications

1 that talks about the consumer welfare effects of revenue
2 sharing?

3 **A.** Yes. I -- no, I'm not aware of that.

4 **Q.** Okay. All right. Another thing that the *Horizontal*
5 *Merger Guidelines* tell you to consider are the conclusions
6 of, "Well informed and sophisticated customers on the likely
7 impact of the merger," right? That's on Section 2.2.2 on
8 your screen?

9 **A.** Yes, I do see it.

10 **Q.** But you don't say a word in your report about the
11 reaction of customers to the NEA, do you?

12 **A.** I haven't studied -- compared predisposed NEA behavior,
13 because I don't think it would be appropriate to do so. Is
14 that the question?

15 **Q.** I'm just saying do it like a merger, where prior to
16 making a decision on the merger, you go out and you ask
17 customers how they are reacting to the proposed transaction.
18 You didn't do anything like that, did you?

19 **A.** No, I don't think that would be helpful in this instance.

20 **Q.** In fact --

21 THE COURT: No, he's just asking whether you did
22 it.

23 THE WITNESS: I didn't do it, no. Okay. Thank
24 you.

25 BY MR. WALL:

1 Q. And, in fact, the government didn't call any customers to
2 testify against the NEA, did it?

3 MR. DERITA: Objection. Calls for speculation.

4 MR. WALL: What?

5 MR. DERITA: And he doesn't have a foundation for
6 this.

7 THE COURT: Well, he was here. Based on his
8 testimony, I understand him to have been here for much, maybe
9 not all of the trial, but he's heard some --

10 THE WITNESS: Half a day.

11 THE COURT: -- he's testified having heard various
12 portions of the trial.

13 MR. DERITA: I believe the question was broader
14 than whether we called anyone as in, like, did we talk to
15 anyone in the --

16 THE COURT: No, I understand called to be called at
17 trial as witnesses.

18 THE WITNESS: To my knowledge --

19 THE COURT: Overruled.

20 THE WITNESS: -- there were no customers called to
21 testify, but I could be mistaken, because I've only been here
22 for one day.

23 THE COURT: Oh. All right.

24 MR. WALL: Okay. Your Honor, I'm just about to go
25 to another subject. I can start for three minutes, or I can

1 -- we can take the break. It's up to you.

2 THE COURT: Why don't you go a little longer?

3 MR. WALL: Okay. Great.

4 BY MR. WALL:

5 **Q.** So let's turn to the way the government has traditionally
6 analyzed airline mergers in particular. Now, you personally
7 worked as a DOJ staff economist on the first of the three big
8 legacy airline mergers, the Delta/Northwest merger, right?

9 **A.** I did, yes, that's correct.

10 **Q.** And that is a merger that the Department of Justice
11 permitted to go forward without remedies and without any
12 challenge, right?

13 **A.** Yes, that's correct.

14 **Q.** And afterwards, as you alluded to in your testimony
15 yesterday, three Department of Justice economists wrote an
16 article on the economic approach that the Department of
17 Justice took in that matter, right?

18 **A.** They did.

19 **Q.** Okay. Let's take a look at Defendants' Exhibit 1068.
20 This is an article entitled, "The Year in Review: Economics
21 at the Antitrust Division, 2008-2009," correct?

22 **A.** Yes.

23 **Q.** And just for context, this has been a practice of the
24 antitrust division over the year, which is to publish some
25 kind of an article that reflects on the economic analysis

1 that had occurred on various matters in the division in the
2 preceding year, right?

3 **A.** That is correct.

4 **Q.** Okay. And the authors here are Ken Heyer, Carl Shapiro,
5 and Jeffrey Wilder, who were all division economists at the
6 time, right?

7 **A.** That is correct.

8 **Q.** And in fact, Dr. Shapiro was the deputy assistant
9 attorney general for economics at the antitrust division at
10 the time?

11 **A.** That's correct.

12 **Q.** Okay. And there is a write-up on this article on the
13 economic analysis that was done with respect to
14 Delta/Northwest, right?

15 **A.** Yes, I believe that's the case.

16 **Q.** Okay. So let's put up a piece of that, which is -- I
17 think you have the article in front of you --

18 MR. WALL: But I don't have a page cite.

19 MS. NELSON: Page 8.

20 MR. WALL: Page 8, I am told.

21 BY MR. WALL:

22 **Q.** So it says here, in terms of the way that that merger was
23 analyzed, is that the DOJ, it says, "Using demand elasticity
24 estimates that are consistent with the empirical literature
25 on the airline industry, along with some neutral assumptions

1 about the nature of consumer demand, our economists were able
2 to calculate the change in consumer welfare implied by the
3 predicted traffic changes for each hypothetical post-merger
4 schedule."

5 Do you see that?

6 **A.** Yes, I do see that sentence.

7 **Q.** Did you personally work on that exercise?

8 **A.** No, I did not.

9 **Q.** Okay. But you understand that what happened in that
10 merger is that the parties had provided the division with
11 predictions of the -- of traffic changes that would occur as
12 a result of the merger, right?

13 **A.** Yes.

14 **Q.** Okay. And the division economists didn't just take those
15 at face value. They did their own analysis of what they
16 thought was realistic and what was not realistic, right?

17 **A.** No, I disagree with that. It was an incomplete
18 characterization.

19 **Q.** It's a what?

20 **A.** It's an incomplete characterization.

21 **Q.** Okay. Whether it is incomplete or not, was at least
22 partially, what I said, accurate?

23 **A.** Maybe I should just clarify.

24 I'm trying to give short answers now.

25 The Department of Justice took as given the

1 schedules produced by the parties and tried to analyze the
2 implications of those. Some context is actually in the
3 subsequent article from the following year.

4 **Q.** Okay. I didn't think we needed to do this, but let me
5 just get the article out for a second.

6 Okay. I am reading from --

7 **A.** Do you have a copy of it, by the way?

8 **Q.** It's actually, if it you just --

9 If you actually just go down to the next paragraph
10 on the page, that's the one?

11 MR. MALONE: It's 1967, page 8.

12 THE WITNESS: Thank you.

13 BY MR. WALL:

14 **Q.** Okay. What it says here in the next paragraph, "It's
15 worth noting that our methods for estimating merger specific
16 benefits produced figures that were far below those claimed
17 by the parties. One major reason for this was that the model
18 used by the parties experts' employed a measure of
19 convenience" -- I'll skip that parenthetical -- "that
20 generated predictions about future traffic flows that were
21 wildly inconsistent by the predictions made by the model that
22 Northwest uses in the ordinary course of business ."

23 So what it is saying here is that you received what
24 the parties said, but you put it to your own analysis and
25 came to the DOJ's conclusions based upon benefits that were

1 lower than those claimed by the parties, right?

2 **A.** Again, I think there's sort of important context here
3 that's missing. But it's consistent with my previous
4 statement, and I can explain, if you'd like.

5 **Q.** And then the conclusion of that analysis is stated in the
6 paragraph that begins above that, "Our best estimates." And
7 it says, "Our best estimates are the likely increases in
8 consumer welfare, significantly exceeded the feared harm to
9 consumers in the overlap routes served by the two carriers.
10 On this basis, we concluded that the merger was likely
11 procompetitive and ought not be challenged."

12 I read that correctly, right?

13 **A.** You read that correctly.

14 **Q.** So what happened in that analysis is the department
15 simultaneously created an estimate of harm on the overlap
16 routes served by the two carriers and benefits on a
17 system-wide basis, and on that basis concluded that the
18 merger was likely procompetitive, right?

19 **A.** No, I think that's not precisely what happened. And I
20 can explain why, if you'd like.

21 **Q.** But Dr. Miller, in your testimony here, you didn't do
22 anything like this, where you actually created your own
23 estimate of both the benefits and the harms and compared them
24 to one another, did you?

25 **A.** Well, I've looked at the efficiencies's claims, and

1 I've -- you know, I don't see that there is compelling
2 evidence of significant and agreement-specific efficiencies
3 from this transaction at the level that would be comparable
4 to the antitrust harm. And so, I mean, ultimately I rely on
5 Professor Town for much of that, but I did consider the
6 efficiencies.

7 **Q.** But let's be clear, you're the last witness in the
8 plaintiffs' case-in-chief. Do you understand that?

9 **A.** Yes, I do.

10 **Q.** Okay. You have literally one sentence on page 99 of your
11 slide deck about efficiencies, right?

12 **A.** That's true.

13 **Q.** You did not quantify efficiencies in any way, shape, or
14 form yourself, did you, sir?

15 **A.** I have not quantified efficiencies.

16 **Q.** Professor Town, when he was here yesterday, did not
17 quantify efficiencies in any way, shape, or form, did he?

18 **A.** I don't want to characterize his testimony, but that's
19 consistent with my understanding.

20 **Q.** Okay. So you aren't doing here what you and your
21 colleagues did in the Delta/Northwest merger, which is to
22 create and quantify efficiencies and compare them to harms,
23 right?

24 MR. DERITA: Objection --

25 THE COURT: What's the --

1 MR. DERITA: -- assumes facts not in evidence.

2 THE COURT: Overruled.

3 THE WITNESS: I would disagree with that assertion
4 and, again, for the same reason that I've said there's
5 important context here that's missing, and I can explain, if
6 you'd like.

7 Dr. Miller: Take a break now, Your Honor?

8 THE COURT: Yes. We'll stand in recess.

9 (Court in recess at 11:05 a.m.)

10 and reconvened at 11:20 a.m.)

11 THE COURT: Go ahead, Dr. Miller.

12 Dr. Miller: Thank you, Your Honor.

13 BY Dr. Miller:

14 **Q.** Dr. Miller, I want to turn to your rationale for using a
15 merger simulation in this case. And for purposes of this
16 discussion, I'll just focus on the nonstop overlap routes,
17 and if we put up slide 57 from Dr. Miller's examination, from
18 his presentation, you recall that you had these different
19 kinds of overlap routes, and you state in here that with
20 respect to the NEA nonstop overlap, it's almost all the
21 traffic and scope, and the effect is almost identical to a
22 full merger between defendants, right?

23 **A.** I do see that. And in your question, you characterize
24 this as a merger simulation, but I view it as a simulation of
25 the NEA.

1 Q. I understand. You called it a merger simulation five
2 times in your original report, right?

3 A. As you -- in my initial report?

4 | Q. Yes?

A. I don't know the answer to that.

6 Q. Okay. We can move on.

7 So what you have done for the NEA, nonstop overlap
8 markets, is model it like a unilateral products merger in
9 which there's a one-shop change in something called a Nash
10 Bertrand equilibrium, right?

11 | A. Yes, that's correct.

12 Q. Okay. And what drives the changes between the observed
13 2019 preNEA prices and the predicted postNEA prices is this
14 ability to internalize diversion between American and
15 JetBlue, and how it leads to a new Nash Bertrand equilibrium,
16 right?

17 | A. That's correct.

18 Q. Okay. That's -- put up slide 17. This is where you
19 say, "Revenue sharing raises prices because of the recapture
20 incentive." And that's substantially the logic of the point
21 that I just made, right?

A. That's correct.

23 Q. Okay. Now -- and there are mathematics in your
24 simulation, which capture this -- this recapture incentive,
25 right?

1 **A.** Yes.

2 **Q.** Okay.

3 **A.** Economics, maybe, but yes.

4 **Q.** Right. So now the mathematics in your simulation are not
5 about some increase in legacy carrier capacity discipline,
6 are they?

7 **A.** That's correct.

8 **Q.** They are not about some thesis that you have established
9 and reduced to mathematics, whereby JetBlue is no longer
10 behaving like an LCC, right?

11 **A.** That's not a yes or no question, because behave like an
12 LCC is --

13 **Q.** Let me rephrase it. Sorry. It may be a bad question.
14 Sorry.

15 The mathematics in your simulation are not about
16 some thesis that you established and reduced to mathematics,
17 whereby there's a fundamental change in the JetBlue business
18 model and it's presentation of itself to the world as a low
19 cost carrier?

20 **A.** These are terms that don't come naturally to me, what I
21 model is the change in the pricing incentives.

22 **Q.** Pricing incentives, based upon recapture?

23 **A.** Yes, that's correct.

24 **Q.** Okay. Now, I'll put up a slide that I used in the
25 opening, defense opening slide 61. I'm sure you've seen

1 this. And this, I'm sure, won't take long, but you're not
2 contending that the NEA is, in fact, a merger, right?

3 **A.** That's correct.

4 **Q.** It's a set of bilateral contracts, right?

5 **A.** Yes.

6 **Q.** And the NEA has no impact on the parties' brands, right?

7 **A.** Not to my knowledge.

8 **Q.** It doesn't affect any control of assets, right?

9 **A.** That's correct.

10 **Q.** There's no permanent transfer of assets through the NEA,
11 right?

12 **A.** That's right.

13 **Q.** American can't use JetBlue planes and vice versa,
14 correct?

15 **A.** That's my understanding.

16 **Q.** Okay. And American and JetBlue have retained the ability
17 to compete with each other, in some respects, within the NEA
18 territories, right?

19 **A.** The ability to compete, yes, they maintained the ability
20 to compete.

21 **Q.** Right. There's no pricing coordination in the NEA,
22 right?

23 **A.** The NEA does not -- that is correct.

24 **Q.** Okay. And so if JetBlue wants to keep charging JetBlue
25 prices, it can do so, right?

1 **A.** It has that option.

2 **Q.** Okay. So and the NEA also has a term, and can end,
3 unlike a merger, right?

4 **A.** Yes, I believe that is the case, that there's a
5 termination -- there are conditions under which it can be
6 terminated.

7 **Q.** Right. So based on those points on which we can agree,
8 the DOJ collaboration guidelines would not analyze the NEA
9 like a merger, correct?

10 **A.** No, I think that's incorrect.

11 **Q.** Let's pull up Section 1.3 of the collaboration
12 guidelines. All right? This reads, "The competitive effects
13 from competitor collaborations may differ from those of
14 mergers due to a number of factors. Most mergers completely
15 end competition between the merging parties and the relevant
16 markets. By contrast, most competitor collaborations
17 preserve some form of competition among the participants."

18 I correctly read that, right?

19 **A.** Yes, that's right.

20 **Q.** And it goes on to say that, "The potential for future
21 competition between participants in a collaboration requires
22 antitrust scrutiny different from that required for mergers."

23 Do you see that?

24 **A.** I do.

25 **Q.** But -- let's put up your slide 14 from your presentation.

1 Right? What you told the Court yesterday is, quote, "The NEA
2 effectively ends competition between American and JetBlue on
3 routes that touch the NEA airports."

4 Right?

5 **A.** Yes, that's my testimony.

6 **Q.** Okay. Now, let's go back to the guidelines. The
7 guidelines outline four elements that, if met, allow the
8 agencies to treat a competitor collaboration like a merger.
9 Correct?

10 **A.** That's consistent with my recollection, but I'd want to
11 refer.

12 **Q.** Well, that's fine. Let's go to page 9 of the
13 collaboration guidelines, and we'll put that up here.

14 **A.** And this is page 5, not page 9.

15 **Q.** It's on your screen. It says, "Nonetheless"?

16 **A.** It's not on the page.

17 **Q.** I may have it wrong.

18 MS. NELSON: Yes, it's page 5.

19 MR. WALL: Sorry, page 5.

20 BY MR. WALL:

21 **Q.** It says, "The agencies treat a competitor collaboration
22 as a horizontal merger in a relevant market and analyze the
23 collaboration pursuant to the *Horizontal Merger Guidelines*,
24 if appropriate, which ordinarily is when certain factors
25 listed are present," right?

1 **A.** That's what it says.

2 **Q.** And the factor "(c)" that's listed and has been
3 highlighted now says, "The integration eliminates all
4 competition among the participants in the relevant market."
5 Correct?

6 **A.** Yes, that's right.

7 **Q.** And then factor "(d)" is that, "The collaboration does
8 not terminate within a sufficiently limited period by its own
9 and express terms." Right?

10 **A.** Yes, that's right.

11 **Q.** So essentially, unless the Court were to find that the
12 NEA eliminates all competition among American and JetBlue in
13 the relevant market, by the terms of the collaboration
14 guidelines it should not be analyzed as a horizontal merger,
15 correct?

16 MR. DERITA: Objection. Calls for a legal
17 conclusion.

18 THE COURT: As to his understanding.

19 THE WITNESS: My understanding is that the NEA
20 effectively eliminates competition. And if there's something
21 around the edge that's not within the scope of the NEA, it's
22 not important enough to interpret this as saying that you
23 wouldn't analyze it like a merger.

24 BY MR. WALL:

25 **Q.** Now, you developed a theory of your own, which is not

1 found in the collaboration guidelines, for treating a
2 collaboration like a merger, correct?

3 **A.** Excuse me?

4 **Q.** Your theory, based upon revenue sharing and capacity
5 coordination having merger-like incentives is not found in
6 the collaboration guidelines, is it?

7 **A.** No, that's false.

8 **Q.** Where is it? Point it out, please.

9 **A.** The collaboration guidelines specify that one impact of a
10 collaboration can be creating a financial stake in the other
11 partner, and that's what the NEA does.

12 **Q.** Okay. But they don't lay out any logic relating to the
13 combination of revenue sharing or capacity coordination to a
14 conclusion that you treat something like a merger, do they?

15 **A.** I don't want to testify to that. I think that to discuss
16 the financial stake and the implications that they can have
17 for agreements and how -- I think how it may link into the
18 mergers, but that's straining my memory.

19 **Q.** Okay. But your theory that incentives, irrespective of
20 control, can lead to treating revenue sharing or a
21 collaboration like a merger is not found in any published
22 economic literature, is it?

23 **A.** No, that would be false.

24 **Q.** What literature is it in?

25 **A.** The -- for example, it's -- the partial ownership stakes

1 have a rich literature.

2 **Q.** Such as the O'Brien and Salop article?

3 **A.** As one of many.

4 **Q.** Okay. Let's pull up the Salop and O'Brien article.

5 **A.** That's right.

6 **Q.** This is "Competitive Effects of Partial Ownership:

7 Financial Interest in Corporate Control," by Steven Salop and
8 Daniel O'Brien, right?

9 **A.** That's correct.

10 **Q.** And let's go to page 562. And they write, "The
11 competitive effects of partial ownership depend critically on
12 two separate and distinct elements: financial interest and
13 corporate control. This distinction is absent in merger
14 analysis, which assumes that the acquiring firm or person
15 automatically controls the acquired entity after the merger."

16 Did I read that correctly?

17 **A.** You read it correctly. This is consistent with my
18 testimony yesterday, as well.

19 **Q.** And here, American and JetBlue are two separately
20 controlled companies, neither which owns any equity of the
21 other, correct?

22 **A.** Correct.

23 **Q.** Okay. So let's go through your reasoning. Section 4 of
24 your initial report is entitled, "The Economic Incentives
25 Created by the Northeast Alliance are Those Created by a

1 Merger," correct?

2 **A.** Yeah, I don't remember the title of that section.

3 **Q.** Okay. There it is on the screen.

4 **A.** Thank you.

5 **Q.** And it begins in paragraph 27:

6 "In this section, I explain that collaborations
7 with features like the NEA, including revenue sharing and
8 capacity coordination provisions, function like an
9 acquisition of ownership."

10 Right? That's what you do in your report?

11 **A.** That's the statement of the -- that's the sentence.

12 **Q.** Okay. And then on page 20, paragraph 29, you purport to
13 explain why the NEA should be analyzed, quote, "using
14 standard merger tools," right?

15 **A.** Yes, I do.

16 **Q.** Okay. And you say you proceed in three steps, which are
17 shown on the next page, or down below, rather, I guess, and
18 the first one, point, is you say, "I show that a
19 collaboration like the NEA affects economic incentives
20 through the same mechanism as a merger." Right?

21 **A.** Yes.

22 **Q.** Now, further down, there is Section 4.1 on page 20, and
23 that is entitled, "An agreement to share revenue or profit
24 creates similar incentives to exercise market power as a full
25 horizontal merger," correct?

1 **A.** Yes, that's what it says.

2 **Q.** And it's in this statement, in this section, rather,
3 where you -- you state that, "In this section I show that a
4 profit sharing agreement typically creates similar incentives
5 to raise prices. This follows because it is the profit
6 sharing feature of a horizontal merger, not coordination or
7 control, that creates such an incentive."

8 I read that correctly?

9 **A.** Yes, you did.

10 **Q.** Okay. So let's put up defense opening slide 63. And so
11 I was correct that, in the flow of your argument in your
12 initial report, the first part of your argument, the first
13 point you made in support of using merger tools was about
14 revenue sharing and the point that an agreement to share
15 revenue or profit creates similar incentives as a full
16 horizontal merger, right?

17 **A.** Yes, I discussed that in the report.

18 **Q.** Okay. And then, further down your report, in
19 Section 4.2, you go on to argue that specific differences
20 between the NEA and a merger do not change the outcome,
21 right?

22 **A.** Yeah, unlikelihood. I read the sentence, "Specific
23 differences between the NEA agreement and a merger do not
24 create clear distinctions in the types of economic incentives
25 that are likely to arise."

1 **Q.** Right. And it is in this section of this report that you
2 raise and address various points the that defendants had
3 made about how the NEA is not a merger, right?

4 **A.** Yes. I believe that's at least part of what that section
5 does.

6 **Q.** And in paragraph 41, you introduce the idea that "The NEA
7 has additional mechanisms in place that allow defendants to
8 avoid exploitation and achieve mutually more profitable
9 outcomes, including the ability to coordinate their capacity
10 and to negotiate side payments to ensure mutually agreeable
11 NEA outcomes," right?

12 **A.** And this is part of my analysis, yes.

13 **Q.** Okay. So let's again put up the slide that I used in the
14 opening, slide 63. And I correctly identified capacity
15 coordination and side payments in the flow of your argument
16 as a -- in a secondary position behind revenue sharing,
17 right?

18 **A.** This is -- I see on the slide, this is what you've
19 labeled it, primary and secondary. That's factually correct.

20 **Q.** Now, let's put on slide 13 from your direct examination.
21 Now, in this slide, you flip the order and you put capacity
22 planning ahead of revenue sharing, right?

23 **A.** Yes.

24 **Q.** And yesterday, you called the debate of over whether
25 revenue sharing is first, or capacity sharing is first,

1 quote, "A little bit of a sideshow," end quote, right?

2 **A.** No, I don't believe -- I think that's not the context in
3 which I made that statement.

4 **Q.** Okay. But the fact is that the role of capacity
5 coordination and side payments in your report is to say that
6 they can and will be used to negate an incentive for
7 unilateral capacity expansion that is found in the MGIA,
8 right?

9 **A.** That's one of the roles for capacity coordination and
10 that's consistent with my testimony yesterday.

11 **Q.** Okay. So essentially, the argument is that no one should
12 believe that the parties will behave consistent with that
13 capacity expansion incentive because, as you put it in your
14 initial report, on paragraph 41, those characteristics of the
15 NEA revenue sharing highlighted by the defendants actually,
16 if taken in isolation, create an incentive to exploit the
17 partner airline, i.e., profit at the partner's expense?

18 **A.** That's the report says.

19 **Q.** Right. And the characteristics that you're talking about
20 are the terms of the MGIA that create unilateral incentives
21 to expand capacity, right?

22 **A.** Particularly create incentives to expand capacity in a
23 way that departs from what would be jointly profitable for
24 the two firms.

25 **Q.** Right. So we'll pause on that phrase "jointly

1 profitable." What you mean is jointly profitable in the
2 sense that being either merged, or economists also sometimes
3 use the term "perfect cartel," would create an incentive to
4 restrict output to raise price?

5 **A.** In this part of my testimony, I'm not characterizing
6 particular effects of what joint profit maximization would
7 imply for the level of output. I'll analyze that later in
8 the report. In this section of the report, I'll just focus
9 on the question of would they maximize their joint profit and
10 come to the determination that they would.

11 **Q.** Okay. So with respect to the revenue sharing, you
12 certainly agree with me that the revenue sharing terms, the
13 parties actually adopted in the MGIA are dynamic rather than
14 static, right?

15 **A.** If by dynamic we mean that the payments change over time
16 as capacity changes, then that would be a reasonable
17 characterization.

18 **Q.** Okay. And in fact, the carriers shared with NEA capacity
19 is not fixed at the 2019 level, right?

20 **A.** The base payments, for example, change, yes, that's
21 correct. Base payments change with capacity.

22 **Q.** And that's what we mean by dynamic, the share of
23 incremental revenue is going to change from year to year?

24 **A.** It's also true with share of incremental revenue. It
25 will depend on the relative capacity.

1 **Q.** But you do not simulate at all changes in capacity over
2 time with your model, do you?

3 **A.** No. My model focuses on 2019.

4 **Q.** Right. You can't. Because the nature of your model is
5 it's this one shot change in the Nash Bertrand equilibrium,
6 right?

7 **A.** Yes, the model focuses on 2019 and the implications of
8 the pricing incentives in 2019.

9 **Q.** Okay. Now, under the MGIA, the parties also pool and
10 share revenues, rather than profits, right?

11 **A.** That's correct.

12 **Q.** So you have argument in your report and you talked about
13 yesterday, that a profit sharing agreement typically creates
14 similar incentives as mergers to raise prices. Right?

15 **A.** Yes.

16 **Q.** And you state on paragraph 32 of your report, "This
17 follows because it is the profit-sharing feature of a
18 horizontal merger, not the coordination or control that
19 creates such an incentive." End quote. Right?

20 **A.** Can you put the slide up for me?

21 Yes, that's in the report.

22 **Q.** Okay. Let's put up slide 25 from your presentation
23 yesterday. Okay. So the title of this is defendants argue
24 the MGIA creates incentive to expand capacity, right?

25 **A.** Yes.

1 **Q.** But you agree that the terms of the MGIA create
2 unilateral incentives to expand capacity, right?

3 **A.** It's nuanced and I didn't get into it just for the sake
4 of it, but the slide says it can create unilateral
5 incentives. It can also create incentives to expand less
6 quickly, and it depends on the particular details of the
7 route in question.

8 **Q.** On the what?

9 **A.** It depends on the details of the route, actually, for the
10 unilateral incentive.

11 **Q.** Okay. So what you're saying is you might get different
12 outcomes from route to route?

13 **A.** I'm saying, on some routes, there might be a unilateral
14 incentive to expand capacity. On other routes, the --
15 creates unilateral incentives to reduce capacity, and I
16 didn't get into any of that nuance, because I didn't think it
17 was relevant to the conclusion that acting on those
18 incentives would exploit the partner, whether it's above or
19 below, and that they're more likely to focus on what
20 maximizes joint profit.

21 **Q.** Right. So let's just put up your slide -- sorry, it is
22 already up here.

23 What you have here is you say, "The MGIA, in
24 isolation, can create unilateral incentives to expand
25 capacity that" -- "above levels that would joint maximize --

1 "that would maximize joint profit." Right?

2 **A.** That's correct.

3 **Q.** Okay. So one take away, from the start, is that these
4 parties negotiated an agreement between them that can create
5 unilateral incentives to expand capacity. Right?

6 **A.** Yes, that's true.

7 **Q.** Okay. And they're -- to use a phrase that you used
8 yesterday, their revealed preference was for an agreement
9 that can create unilateral incentives to expand capacity,
10 right?

11 **A.** No, I don't think those -- I think that mischaracterizes
12 my testimony. I agree that they're using this formula, but I
13 don't have any evidence to think they're using this formula
14 because of incentives that it creates. I think it's useful
15 for other ways that I testified to yesterday.

16 **Q.** But the normal intuition in economics is that the terms
17 of a contract that parties enter is the revealed preference
18 for the way that they wish to behave under the course of the
19 contractual relationship, right?

20 **A.** Without characterizing what's in the literature, it makes
21 sense that they want to do the NEA. And if you look at the
22 NEA as a whole, that both of them perceive that they'll be
23 better off with the NEA than without the NEA.

24 **Q.** On these terms?

25 **A.** Yes. And also analyzing these terms in the context of

1 the broader agreement.

2 **Q.** So the MGIA also subsidizes capacity growth, right?

3 **A.** No.

4 **Q.** Let's pull up slide 25.

5 MS. NELSON: It's up.

6 MR. WALL: I'm sorry, I thought it was a different
7 slide.

8 BY MR. WALL:

9 **Q.** So second bullet: "Acting on those incentives would
10 exploit the partner who is subsidizing capacity growth that
11 reduces joint profit."

12 Those are your words, right?

13 **A.** Right. So it's the partner who is subsidizing the
14 growth, not the NEA.

15 **Q.** Okay. Each partner to the NEA subsidizes the growth of
16 the other, right?

17 **A.** Yes, that can happen.

18 **Q.** Okay. It didn't -- it can happen, it does happen. It's
19 in the math, right?

20 **A.** No, it's not necessarily, because as I said the MGIA also
21 can create incentives to reduce capacity. I don't think it's
22 a helpful discussion to go to the nuance, although we could,
23 because I think the structure is in place for them to work in
24 their joint interest.

25 **Q.** Right. And that is your point in the now famous

1 Footnote 68. So let's put up slide 54 from your presentation
2 yesterday. You actually had a series of slides on this one,
3 but we picked up the one that highlights the word, "Behave."
4 And in Footnote 68 of your initial report, you make this
5 statement that, "In my analysis, I assume it is a mechanical
6 matter. The defendants jointly set capacity and then share
7 revenues according to the dynamic revenue sharing formula in
8 the NEA, but behave as though they share profits according to
9 a static formula based on their pre-NEA capacities."

10 Right?

11 **A.** Yes.

12 **Q.** And so you're saying your analysis is predicated on the
13 idea that there will be behavior contrary to the terms of the
14 MGIA, taken in isolation. Right?

15 **A.** I disagree with that. It's not a predicate. It's my
16 analysis of the economic incentives. It's my conclusion.

17 **Q.** Right. So -- fine. Your conclusion is behavior will
18 depart from the terms of the MGIA taken in isolation.

19 **A.** That's -- you know, the terms of the MGIA have
20 complicated nuances that can point in different directions,
21 including to joint profit maximization, so whether or not
22 this actually departs from the unilateral incentives in the
23 MGIA is an uncertain thing, but what I'm modeling is joint
24 profit maximization.

25 **Q.** Right, but -- and what you're saying is that you believe

1 that there is a more profitable course for JetBlue and
2 American than following the literal terms of the MGIA, and
3 that is to act like a jointly profit maximizing firm,
4 correct?

5 **A.** With respect to capacity coordination, yes.

6 **Q.** And with respect to the prices they set.

7 **A.** With respect to the pricing incentives, I've modeled this
8 as profit sharing, which I've explained actually understate
9 price changes relative to revenue sharing.

10 **Q.** But Doctor, your model is a model of pricing, not
11 capacity, right?

12 **A.** It's a model of pricing, yes.

13 **Q.** You didn't model capacity, correct?

14 **A.** I held capacity fixed at 2019 levels.

15 **Q.** But you said yesterday when you were here, "Mine is not a
16 model of the capacity decision," correct?

17 **A.** That's true.

18 **Q.** Okay, but you agree that the airline industry can be
19 conceptualized as involving two decisions, one capacity, and
20 then pricing, right?

21 **A.** Yes, I think that's a fair characterization.

22 **Q.** And you would agree that, as an economic matter, an
23 increase in capacity, with all else equal, lead to downward
24 pricing pressure and a decrease in prices, correct?

25 **A.** I don't know what "all else equals" means in this

1 context. You're allowing prices to float.

2 **Q.** Would that make you the only economist in the world that
3 doesn't know what "all else equals" means?

4 **A.** Well, you changed prices as well.

5 **Q.** Let's go on, Dr. Miller.

6 Look, a principal point of Dr. Town's testimony was
7 that more capacity in the industry puts downward pressure on
8 the fares, right?

9 **A.** As a general matter, I think that's correct.

10 **Q.** Okay. But despite that, you have not modeled the MGIA or
11 NEA's effects on American's JetBlue capacity setting
12 decisions, have you?

13 **A.** Well, I've looked at the implications of the model.

14 **Q.** Now, I'm asking you about your model, sir. In your
15 model, you hold capacity constant at 2019 levels, correct?

16 **A.** Yes, I do.

17 **Q.** Okay. You do not consider any force that might lead to
18 there being more or less capacity that existed at that moment
19 in time in 2019, correct?

20 **A.** That would be false.

21 **Q.** How is that false?

22 **A.** As I explained before, the results of the model inform
23 along the nonstop overlap routes the direction of the
24 pressure on capacity.

25 **Q.** Well, exactly. What you're saying, though, is that your

1 model, when it predicts a price increase, has got to account
2 for it by a corresponding reduction in capacity on that
3 route, right?

4 **A.** No, I didn't testify to that.

5 **Q.** I didn't ask you whether you testified to that. I'm
6 asking you, isn't it a fact that if we were actually to look
7 at the -- at the results of your predictions, that every time
8 we see a predicted price increase by American or JetBlue,
9 that is accompanied by a prediction of a capacity reduction
10 by American or JetBlue respectively?

11 **A.** What I lay out is that there creates an incentive to
12 reduce capacity along the nonstop overlaps where we see
13 substantial price elevations on many of them. And as I
14 explained the other -- yesterday, how that would manifest in
15 capacity reductions depends on a number of considerations
16 that are outside the model.

17 **Q.** Right. But the point is here is that you haven't modeled
18 the capacity setting decision, it's just that, in the logic
19 of your simulation, if prices go up, capacity has to come
20 down, right?

21 **A.** No, I'm not talking about changes in the capacity. I'm
22 saying that, if you're people on a plane, there's an
23 incentive to reduce capacity. Whether or not capacity
24 actually goes down will depend on a host of other
25 considerations.

1 **Q.** Right. The model takes capacity as a given, correct?

2 **A.** The model is estimated and simulated using 2019
3 capacities.

4 **Q.** Okay. So for example, if American Airlines and JetBlue
5 grow in New York to meet the 15 percent growth commitment to
6 the Department of Transportation, the downward pricing
7 pressure that would result from that is not accounted for in
8 the model, is it?

9 **A.** It's not clear -- are you saying are they going to grow
10 on particular nonstop overlaps that I'm looking at?

11 **Q.** You can't answer the question the way I phrased it?

12 **A.** It's not a question that I can answer, because I've
13 analyzed competition on particular markets and your question
14 is about capacity as exists sort of nebulously outside of New
15 York City.

16 **Q.** Okay. Let me take that problem away for you.

17 So assume that when American and JetBlue grow to
18 meet their 15 percent growth commitment to the DOT on flights
19 from LaGuardia and JFK, they do so proportionally to the
20 number of routes served. Okay? Okay.

21 Now, so by that hypothesis, every route has some
22 amount of increased capacity, okay?

23 **A.** Okay.

24 **Q.** Okay. The downward pricing pressure that would result
25 from that increased capacity is not accounted for in your

1 model, is it?

2 **A.** That's correct.

3 **Q.** Okay. The downward pricing pressure from 30 net -- new
4 JetBlue aircraft is not in your simulation, correct?

5 **A.** I don't want to endorse that there's 30 additional
6 aircraft that arise due to the NEA. That's not a question
7 that I've studied, but I do the model as of 2019 and the
8 capacities that are in 2019.

9 **Q.** Right. So whether the number of new aircraft are 30 or
10 50 or 100, whatever it is, the downward pressure from new
11 aircraft are not going to be accounted for in your model,
12 correct?

13 **A.** That's correct.

14 **Q.** The downward pricing pressure from an increase in block
15 hours, to which Vasu Raja testified, will not be accounted
16 for in your simulation, correct?

17 **A.** Could you -- could you remind me what his testimony was?

18 **Q.** Well, I don't recall the specifics exactly, but just --

19 **A.** I think it's the same answer.

20 **Q.** It is the same answer.

21 **A.** I'm just trying to be careful as to what I testified to.

22 **Q.** So if the evidence at trial would indicate that there's
23 going to be a ten percent increase in block hours above a
24 preNEA benchmark, the downward pricing pressure from that
25 increase in block hours would not be accounted for in that

1 model, correct?

2 **A.** I'm not sure what block pricing is in this context.

3 That's why I wanted to --

4 **Q.** Block hours?

5 **A.** Right. Block hours in this context. That's why I wanted
6 to look at the transcript.

7 **Q.** It's flying.

8 **A.** It's flying?

9 **Q.** Yeah.

10 **A.** Oh. Then I think the same answer. I'm holding the
11 capacity as fixed at 2019.

12 **Q.** And generally, if you're assumption about behavior is
13 incorrect and both American and JetBlue take advantage of the
14 capacity expansion incentives in the MGIA and grow, that is
15 not accounted for in your model, correct?

16 **A.** I disagree with some parts of the question. First of
17 all, it's not -- it's not taking advantage of. I think it's
18 actually a negative when we think about where that takes them
19 in terms of their profitability. And my models is focused on
20 the pricing incentives as of the 2019. So this is what I've
21 said repeatedly.

22 **Q.** And just indulge me, then, in the assumption that there
23 might be a world in which both American and JetBlue take
24 advantage of the capacity expansion incentives in the MGIA
25 and grow. If that happens, the growth and the downward

1 pricing pressure from it are not accounted for in your model,
2 correct?

3 **A.** That's right. The model is based on 2019 capacities.

4 **Q.** Okay. I want to talk to you about some of the things
5 that you said yesterday about -- about capacity coordination.

6 First of all, you understand, don't you, that when
7 Dr. Town put on all that testimony about capacity discipline,
8 that was all directed at decisions that airlines make about
9 their aggregate industry capacity, right?

10 **A.** I -- I'm cautious to characterize his testimony, but
11 that's the -- that's what I recall at the moment.

12 **Q.** Okay. You understand that the NEA doesn't involve any
13 coordination or even discussion of American and JetBlue's
14 aggregate industry capacity, right?

15 **A.** I believe that's correct.

16 **Q.** There's only joint network planning relating to NEA
17 routes, correct?

18 **A.** That's my understanding of the contract.

19 **Q.** Okay. Let's put up your slide 24 from yesterday. This
20 one is entitled "Defendants will coordinate capacity under
21 the NEA." And you remember you gave some testimony yesterday
22 about what you thought the implications were for these points
23 on the NEA.

24 **A.** I'm sorry, did you ask a question?

25 **Q.** No, just you remember that you discussed this yesterday,

1 right?

2 **A.** Yes, I do.

3 **Q.** And in it, you make the statement, "Defendants indicate
4 they plan to maximize joint profit." Right?

5 **A.** Yes, I do.

6 **Q.** Define for me precisely what you mean by "maximize joint
7 profit."

8 **A.** I expect them to make the route decisions that make sense
9 for both of them together so that American and JetBlue both
10 benefit from the decisions that are made.

11 **Q.** And how will those capacity decisions change in relation
12 to the sum of the individual capacity decisions that they
13 would make? Would there be more capacity, less capacity, or
14 the same amount of capacity?

15 **A.** Along the nonstop overlaps my economic analysis indicates
16 that there's an incentive to reduce capacity.

17 **Q.** Right. And so in this usage, maximized joint profit is
18 essentially synonymous with make capacity decisions that
19 reduce capacity, right?

20 **A.** Along the particular nonstop overlaps, the model
21 indicates that there may be an incentive to reduce capacity.

22 **Q.** Okay. And when you decided to choose evidence in favor
23 of that point to highlight to Judge Sorokin, you cite some
24 documents here that are footnoted there in the lower right
25 hand part of the page, right?

1 **A.** Yes, I believe so.

2 **Q.** Okay. Let's look at the first of those, which is
3 Plaintiffs' Exhibit 286. And of course you're familiar with
4 this. This is an American -- AA and B6 Project Garland
5 proposal from April of 2020, right?

6 **A.** Yes, I do.

7 **Q.** And let's go to the next page, please, and highlight the
8 top statement and the bullets underneath it. Okay. So what
9 we have here is it says, "Objective/proposal" and there's a
10 number of bullets. The first is, "Maximize customer value
11 and connectivity in JFK, LaGuardia, and Boston."

12 Is that synonymous with reducing capacity as part
13 of joint profit maximization?

14 **A.** No, I think this is a different statement than that.

15 **Q.** Okay. The next one is, "Improve overall relevance and
16 competitiveness in the Northeast region." That's not
17 reducing capacity by virtue of joint profit maximization, is
18 it?

19 **A.** No, this is different.

20 **Q.** Okay. The next one is, "To accomplish this, American and
21 JetBlue would enter into a metal neutrality agreement that
22 incentives both carriers to provide a better and robust
23 network and customer experience."

24 Providing a better and robust network and customer
25 experience is not capacity reduction as part of the joint

1 profit maximization, is it?

2 **A.** Well, the point of metal neutral sort of leans into this
3 idea that they're working together. And that's what I'm
4 focused on is the implication of American and JetBlue working
5 together and cooperating, rather than competing. The rest of
6 the statement is different than particularly reducing
7 capacity.

8 **Q.** Right. But if the outcome of that metal neutrality is
9 providing a better and robust network and customer
10 experience, that's not reducing capacity to raise prices, is
11 it, sir?

12 **A.** Well, if you increase quality, it has implications for
13 prices, of course.

14 **Q.** Right. Because without any loss of consumer surplus, you
15 get paid more for the higher value you're providing, right?

16 **A.** The two go hand-in-hand.

17 **Q.** So the answer to my question is yes?

18 **A.** I think -- I think yes is a reasonable approximation, at
19 least.

20 **Q.** Okay. So in fact, every one of the benefits -- excuse
21 me. Every one of the objectives that are outlined in the
22 document that you cited is consistent with a plan to actually
23 enhance consumer welfare through more output, better quality
24 networks, and more competitive product positioning, right?

25 **A.** They could be interpreted that way.

1 **Q.** Let's go back to -- let's go to PX456, which you -- you
2 highlighted.

3 Now, you quote this document for a statement that,
4 "The defendants will engage in network planning as if their
5 Northeast assets were a single airline."

6 Do you remember that?

7 **A.** Yes, I see it on this second sentence here.

8 **Q.** Right. And you presented that in your earlier slide as
9 an indication that the parties would attempt to engage in
10 joint profit maximization, in the sense of reducing capacity
11 to increase prices, right?

12 **A.** I'm sorry, could you --

13 **Q.** Let's go back to the slide. We'll take it one step at a
14 time. It's fair enough. Let's go back to the slide.

15 Okay. The big bullet in the middle, "Defendants
16 indicate they plan to maximize joint profit." Do you see
17 that?

18 **A.** Yes, I do.

19 **Q.** The second minor bullet, Defendants will, quote, "engage
20 in network planning as if their Northeast assets were in a
21 single airline." End quote. Do you see that?

22 **A.** Yes, I do.

23 **Q.** Okay. And so you cited PX456. Do you think that that
24 document that you cited and highlighted to Judge Sorokin
25 gives an accurate impression of the NEA?

1 **A.** I wouldn't want to characterize it that way. I'm
2 pointing out here that the document states that they will --
3 are likely to maximize joint benefit of the NEA, which is
4 consistent with my analysis of how they use capacity
5 coordination.

6 **Q.** Okay. Well, let's go back to what the document that you
7 quoted and presented actually says. So go back to PX456.

8 Do you notice who the author of this document is?

9 **A.** It's hard to read. Is that you?

10 **Q.** It is me. It is me.

11 As an economist, what do you think that the odds
12 are that I would say something that would indicate that the
13 NEA is consistent with joint profit maximization?

14 **A.** I don't know how to answer that question.

15 **Q.** Let's just look at what it says under, "Coordination"
16 here.

17 "The agreement between the parties anticipates that
18 they will jointly discuss the best utilization of slots,
19 gates, and aircraft at Boston and New York City airports. In
20 essence, they will engage in network planning as if their
21 Northeast assets were in a single airline, looking for
22 opportunities to expand network coverage, ensure the right
23 aircraft is in the right market, expand connectivity, and get
24 the most productivity out of their assets."

25 That's not a statement about what firm seeking

1 joint profit maximization through reduced capacity would do,
2 is it, sir?

3 **A.** Well, I think the fact that I take out of this, or one of
4 the salient facts is that they're going to combine assets as
5 if they're a single airline, and that's how I've bottled it,
6 and now I've tried to look at the economic incentives that
7 that creates and that's what I've explored along the overlap
8 routes.

9 **Q.** And you've explored it and you've made your predictions,
10 but Dr. Miller, you would agree with me that it's at least
11 possible that on some of these routes, JetBlue and American
12 could decide to increase capacity?

13 **A.** They could. But I think that would be contrary to their
14 incentives.

15 **Q.** Okay. And it's possible that on some routes they would
16 decide to reduce capacity, right?

17 **A.** It's possible, as well.

18 **Q.** And whether the capacity decisions create upward pricing
19 pressure or downward pricing pressure depends on what
20 decisions they make, right?

21 **A.** It's not clear the extent to which a capacity increase on
22 a nonstop overlap creates downward pricing pressure because,
23 of course, you're aligning the revenue sharing at the same
24 time. And that has implications for how this plays out in
25 the market.

1 **Q.** It's not clear, is it, sir?

2 **A.** It's not clear? The upward pricing pressure is something
3 that I can quantify. I haven't seen evidence that's --
4 quantifies capacity expansion or other efficiencies in a way
5 that would be significant.

6 THE COURT: Why wouldn't adding capacity,
7 particularly on a nonstop route, create downward pricing
8 pressure?

9 THE WITNESS: I think it would. It's a measure of
10 quantifying it. I haven't quantified it.

11 THE COURT: I see.

12 BY MR. WALL:

13 **Q.** But the reality is that the only way to tell whether your
14 predictions are going to be right or wrong is wait to see
15 what capacity decisions the parties make, right?

16 **A.** No, I disagree, I can analyze the incentives, and that's
17 what I've done.

18 **Q.** Well, you've kind of --

19 THE COURT: Well, but how would that determine
20 whether your predictions are right or wrong?

21 THE WITNESS: The model does well on other
22 standpoints, so I've hit various benchmarks, both relative to
23 the literature and relative to the price prediction it
24 implies, and so I have a fair confidence in the model in
25 terms of the changes and pricing and quantity that are

1 implied by the revenue sharing agreements, and what I see is
2 that fewer passengers are on the plane, flying nonstop. So
3 now that's the connection that I'm drawing.

4 THE COURT: That's reasons to believe that the
5 model is reliable.

6 THE WITNESS: Yes, that's correct.

7 THE COURT: But that doesn't mean that the -- but
8 all of what comes out of the model are predictions of the
9 future.

10 THE WITNESS: That's right.

11 THE COURT: All -- whether you're at 100 -- if you
12 rated the confidence of the model's predictions, you would
13 rate it somewhere not less than zero and not more than
14 100 percent, correct?

15 THE WITNESS: Yes, that's right.

16 THE COURT: But whether you rated it at zero or
17 100 percent or anywhere in between, that confidence level
18 would just be a gauge of how likely it is to be actually
19 accurate.

20 THE WITNESS: That might be right. I'm not sure --

21 THE COURT: In the sense that if we looked forward
22 to see what happened, you could have -- let me put it another
23 way.

24 The model could be 100 percent confidence level,
25 right?

1 THE WITNESS: Uh-huh. I've --

2 THE COURT: Well, it seems unlikely that it's
3 100 percent, right? But in theory, it could be 100 percent.
4 It's somewhere between zero and 100 percent, would that be
5 fair?

6 THE WITNESS: That's right.

7 THE COURT: So whatever the level of confidence of
8 this model, or any model, if, in fact, that -- if we fast
9 forwarded --

10 THE WITNESS: Yeah.

11 THE COURT: If I stayed this case -- I'm not going
12 to do this -- but if I did, despite the temptation, if I
13 stayed this case and we went forward ten years, and you then
14 had ten years of data to look at of what actually happened,
15 and if what actually happened was different than your model,
16 than the model's predictions, that would not mean that the
17 predictions were, like, bad predictions, it just would mean
18 they weren't accurate.

19 THE WITNESS: It depends on how you conceptualize
20 things, because other things can change, as well. So in
21 terms of whether or not what you see --

22 THE COURT: It might not be because there was
23 something wrong with the model. There could have been a
24 change in the world.

25 THE WITNESS: That's correct.

1 THE COURT: Right. But it still wouldn't change
2 the fact that the prediction of the model was wrong, if it
3 was wrong.

4 THE WITNESS: Not necessarily.

5 THE COURT: Well, suppose the model predicts a
6 \$638 million increase, right? If it turned out that that
7 increase was zero, that \$638 million would be wrong.

8 THE WITNESS: Not necessarily. It -- and I know
9 it's sort of why would that be, but I could explain it.
10 Because, for example, if prices would have gone down, but,
11 instead, they're unchanged, then the model could actually be
12 correct. In other words, if you have --

13 So suppose fuel costs go down, so prices are going
14 to fall with fuel costs --

15 THE COURT: So if all other things -- so if all
16 other things -- what you're saying is not that -- I'm saying
17 there wasn't a \$638 million charge. You're saying there
18 could have been a difference, because there's something else
19 that accounted for it, essentially something akin to the
20 opportunity clause. I'm not saying that. I'm saying your
21 model predicts, all the things being equal, a \$638 million
22 charge.

23 THE WITNESS: That's right.

24 THE COURT: Right?

25 THE WITNESS: Yes.

1 THE COURT: I'm saying zero, that's what it turns
2 out.

3 THE WITNESS: Uh-huh.

4 THE COURT: Then it turns out it's zero.

5 THE WITNESS: Sure. All things being equal, it's
6 zero.

7 THE COURT: So in that sense, you're saying that it
8 could be that the reason -- it could be actually a
9 \$638 million cost that's masked by a decrease in fuel prices.
10 But that would still be a \$638 million costs.

11 THE WITNESS: That's correct.

12 THE COURT: So that's a question of whether it's a
13 net cost as opposed to an assent, like you're netting out the
14 fuel cost.

15 I assume that my question then assumes that then
16 netting out something like that, an actual harm -- you're
17 assuming an actual harm of 638 million. If there's none, the
18 prediction is inaccurate, without regard to the confidence
19 level.

20 THE WITNESS: Okay. I do think that's a
21 straightforward conclusion.

22 THE COURT: Yeah, I mean, it seems obvious.

23 THE WITNESS: Okay. Yeah. I don't want to
24 disagree with you.

25 THE COURT: I mean, you can. I'm just asking.

1 THE WITNESS: I just want to make sure we're on the
2 same page.

3 THE COURT: So from my perspective, so I
4 understand, there's a difference between confidence level --
5 it could turn out that it's -- that the results it predicts
6 don't transpire. Maybe that's a better way to put it.

7 THE WITNESS: Uh-huh.

8 THE COURT: And even netting out. The reason they
9 don't transpire could be because there were external events
10 that nobody contemplated that are not factored into the
11 model, right?

12 THE WITNESS: Yes.

13 THE COURT: It could be because the model did not
14 accurately predict the behavior of the industry of the
15 parties.

16 THE WITNESS: That's correct.

17 THE COURT: And so all we -- but we have -- that
18 would be, if it all went forward -- if I stay the case,
19 maybe, ten years, then we would know. We would know what
20 actually happened.

21 THE WITNESS: We would know what actually happened.
22 We would have to go back and -- some of the ones that I
23 think --

24 THE COURT: Then we would know, I would know for
25 sure, for example, whether or not there was, in fact, harm.

1 You could -- you and other economists could then look back at
2 all the actual historical data and determine or come up
3 with --

4 THE WITNESS: Do you want me to give you my opinion
5 on that?

6 THE COURT: Sure.

7 THE WITNESS: I think that for some of the price
8 effects that we're seeing in the range of 10 percent, which
9 actually the average of what I get, you know, isolating the
10 fact of the NEA on prices to the degree of precision that
11 would be needed to have confidence to show you that the
12 10 percent effect happened and wasn't due to something else
13 would be difficult to accomplish.

14 THE COURT: Because the world is too complicated.

15 THE WITNESS: That's right. And you can have a lot
16 of testimony --

17 THE COURT: Right.

18 THE WITNESS: -- about it. So that will happen.

19 THE COURT: But it's no less complicated
20 prospectively than retrospectively.

21 THE WITNESS: Prospectively is also challenging.
22 So there are a whole host of things that I have to think
23 about to do a prospective analysis.

24 THE COURT: No, I understand you're not suggesting
25 that it's 100 percent confidence.

1 THE WITNESS: That's right.

2 THE COURT: Okay. I think I got it.

3 Go ahead.

4 BY MR. WALL:

5 **Q.** Breaking the rule of never correcting the judge, your
6 model actually doesn't predict anything in the future, right?
7 It predicts a one-shot change in 2019, between two Nash
8 Bertrand equilibria?

9 **A.** Yeah. I'm looking at the effect of the NEA as
10 implemented in 2019.

11 **Q.** Right. And that's the only data point you have for
12 talking about anything that might transpire in the future,
13 right?

14 **A.** No, I wouldn't call that my only data point. I've looked
15 more broadly at econometrics studies and the JetBlue effect,
16 and how JetBlue's pricing responds to --

17 **Q.** Not my point, sir. I'm sorry. Bad question, maybe.

18 There was testimony yesterday that your number is
19 an annual number, right?

20 **A.** That's correct.

21 **Q.** It's only calculated once, right?

22 **A.** That's right. It's the harm that arises in 2019.

23 **Q.** Right. Okay. Finishing up on the model. Other sources
24 of downward pricing pressure, the model doesn't take into
25 consideration any efficiencies, does it?

1 **A.** The model does not consider efficiencies. It's the
2 measure of the adverse pricing incentives.

3 **Q.** The model does not account for any downward pricing
4 pressure that would result from aggressive actions by
5 competitors to compete against the NEA, does it?

6 **A.** No, it does account for the interactions of the
7 competitors. In fact, as the model shows, the incentive of
8 competitors is actually to raise price in response to that
9 price elevations, and the model captures that.

10 **Q.** Yeah. Okay. Let's look at that, then. I was going to
11 skip that, but hold on.

12 Okay. Let's pull up DX1056, please.

13 So Compass Lexecon, as I'm sure you know --

14 THE COURT: He might need to see it in his book,
15 because it might be hard to read on the screen.

16 It's in the book, right?

17 MR. WALL: Yeah.

18 THE COURT: Just give him a minute to --

19 THE WITNESS: Where in the book is it?

20 MR. WALL: It's DX1056.

21 THE COURT: A couple tabs in.

22 THE WITNESS: I see it. It's actually too small
23 for me to the read in the book, too. Do you have a
24 magnifying glass?

25 THE COURT: Do you have a phone?

1 THE WITNESS: I don't have a phone -- I can't see
2 the whole thing here, but --

3 THE COURT: Oh, it's blown up. You'll probably be
4 able to see it.

5 MR. WALL: I'll try to make sure that we blow up
6 what it is that you need to see. Okay?

7 BY MR. WALL:

8 Q. So as I'm sure you knew, Compass Lexecon extracted the
9 fares that lead to the results in your slides 59 and 60,
10 which were previously Exhibit 25 to your report, right?

11 THE WITNESS: Do you mind if I take a moment to
12 look at the document?

13 THE COURT: Yeah, go ahead.

14 MR. DERITA: I'd just like to ask for a
15 clarification, Mr. Wall. Does this use the updated report
16 and back up, or corrected report and back up that we
17 submitted a few weeks ago?

18 MS. NELSON: No. It does not. It was the same one
19 that was used in the deposition, because we received that
20 very late and have not been able to recalculate.

21 BY MR. WALL:

22 Q. Okay. So it might be off a little bit, but
23 directionally, it is going to be very similar, right?

24 A. As you know, I updated the results of the report and
25 provided that and the price effects and the updated report

1 are along particular routes is a good bit less than the price
2 effects -- the percentages are the same, but the dollar
3 amount was corrected. And so along many routes, if I recall,
4 it's a 30 or 40 percent change, but I'd have to look at it to
5 be sure.

6 **Q.** Okay. But if that turns out to be an issue, your counsel
7 can deal with it on their examination or the rebuttal case.
8 I just want to point out, though, let's take the route of DCA
9 Boston. That is one I want you to predict \$180 million of
10 harm, right?

11 **A.** Yes, that's right.

12 **Q.** Okay. And when you look at the actual fares that your
13 model is predicting, the simulation is predicting that
14 American raises its pre-NEA fare of \$342 to \$553, right?

15 **A.** No, that's wrong. That's the number that's updated.

16 **Q.** Well, okay. But the way you did it in your disclosure
17 report, that's right?

18 **A.** The initial report that's wrong. Yeah, these are wrong
19 numbers.

20 **Q.** Okay, but these numbers are 342 to 553, correct?

21 **A.** That's what this screen says.

22 **Q.** Okay. And that's a 61.8 percent increase, right?

23 **A.** Are these the -- yeah, but the -- here, I believe, the
24 61.8 is not what's in my report. I suspect this has been
25 recalculated based on incorrect numbers.

1 **Q.** In this extraction from your backup data, JetBlue raises
2 its preNEA fare of \$293 to \$465, a 58.7 percent increase,
3 right?

4 **A.** This is not a representation of what the model says.

5 **Q.** And Delta, for some reason, raises its pre-NEA fare of
6 \$284 by only 7.9 percent to \$306, right?

7 **A.** That's what's on the sheet.

8 **Q.** And that means that you are suggesting that the Nash
9 Bertrand equilibrium is a world in which Delta underprices
10 JetBlue by almost 35 percent, right?

11 **A.** These numbers are not accurate and don't characterize the
12 results of the model.

13 **Q.** Okay. But if -- do you have any reason to believe that
14 if we get your latest numbers and do exactly the same thing,
15 which we're happy to do and present them to you on the
16 rebuttal case, that that's going to be directionally any
17 different?

18 **A.** Directionally? Clarify what directionally --

19 **Q.** You're still going to end up with a new Nash Bertrand
20 equilibrium in which Delta is pricing way below JetBlue,
21 right?

22 **A.** That may have just emerged premerger, as well, but I want
23 to look at the real numbers to see.

24 **Q.** Well, have you looked at real numbers for the route of
25 which so much has been made in this case of New

1 York-LaGuardia to Boston, on which American Airlines actually
2 exited?

3 **A.** I think those numbers are provided in my report.

4 **Q.** Right. And there hasn't been -- since the NEA -- since
5 American exited, any fare increase that looks anything like
6 what you're predicting in your report, has there?

7 **A.** I haven't looked into that, so I shouldn't testify to it.

8 **Q.** Okay. So let's look at some of the percentage price
9 changes that you have. Pull up slide 59, again, the Boston
10 results. And we'll just follow-up on the conversation that
11 you had with Judge Sorokin about the accuracy in predictions.

12 So can you name for me any published economic study
13 of prior airline mergers that found post-merger fare
14 increases, anything like the 90 percent that is found in the
15 case of Charlotte?

16 **A.** The studies look at average price effects, and as I
17 testified before, the average price effect I obtained of
18 9 percent is well within the bounds of, for example, the work
19 in Craig Peters.

20 **Q.** The Craig Peters' 2006 study of 1980s airline mergers,
21 right?

22 **A.** That's correct.

23 **Q.** Let's just keep it in this millennium.

24 **A.** That's in this millennium. I'm sorry.

25 **Q.** I'm sorry, century, you're right?

1 THE WITNESS: Sorry.

2 THE COURT: I'm just not sure it is in this
3 millennium.

4 MR. WALL: So in this century --

5 THE COURT: This is the millennium in which the Red
6 Sox have won the World Series more times than the Yankees.
7 That was the last millennium. The Yankees were dominant in
8 the last millennium. I'm sorry --

9 MR. SCHWED: Objection, Your Honor. I don't know
10 what basis, but I object.

11 THE COURT: So we have a positive future to look
12 forward to, despite what happened this year.

13 MR. WALL: I think Your Honor needed to use that
14 now for sure.

15 BY MR. WALL:

16 **Q.** So can you name for me any of the published economic
17 literature, since, say, 2000, of any airline mergers that
18 have occurred in that period, that found post-merger fare
19 increases of any of the percentage price changes that you
20 have in your simulation of results for Boston nonstop overlap
21 routes?

22 **A.** This isn't a study that I've done specifically, because I
23 didn't think the literature was useful. But I can't name
24 articles that point to, for example, a price increase on THE
25 average of 9 percent, due to the last three legacy mergers.

1 **Q.** Let's -- give me 7.1 percent, the lowest value here. Can
2 you name me something that came up with 7.1 percent?

3 **A.** This is the lowest value in Boston, but it's not the
4 lowest value that's predicted by the model.

5 **Q.** I understand that, sir, but my question is about the
6 lowest value for Boston. Can you name for me any airline
7 retrospective study, since 2000, that has found that an
8 actual airline merger produced higher fares on nonstop
9 overlaps of 7.1 percent or greater?

10 **A.** This is not a literature I've attempted to summarize for
11 this purpose.

12 **Q.** So the answer to my question is, no, you can't identify
13 any such thing?

14 **A.** That's correct.

15 **Q.** You have reviewed Dr. Town's report in this case, right?

16 **A.** Yes, I have.

17 **Q.** And Dr. Town states that from his review of the
18 literature about other airline mergers, they have found low
19 single-digit impacts on price one way or the other, right?

20 **A.** Yes, I believe that's in there.

21 You don't have a copy of his report, do you?

22 **Q.** We do. It's in your binder. It's paragraph 111.

23 **A.** Which binder?

24 **Q.** Yes, we have it. We have a binder here. I'll give you
25 one.

1 All right. Reply report. My bad.

2 **A.** Thank you.

3 **Q.** Right there.

4 **A.** Well, I do see the sentence. I think there actually is a
5 citation that Professor Town discusses that would suggest,
6 actually, much larger price effects. And I can show that in
7 his report, as well.

8 **Q.** That's the Craig Peters article?

9 **A.** No, it's not.

10 **Q.** Which one?

11 **A.** The Bet 2021 analysis of the American/US Air merger.

12 **Q.** Okay. But you are familiar with Dr. Peters' article
13 about the People's Express three-way merger in the 1980s,
14 right?

15 **A.** Yes, I'm familiar with that article. It's about that
16 merger and four others, as well.

17 **Q.** Right. And that's an article in which Dr. Peters says
18 that the 30 percent price increase he found was particularly
19 striking, but consistent with the hypothesis that financially
20 distressed carriers, such as People's Express and its
21 subsidiary Frontier Airlines, have a tendency to charge
22 unsustainably low prices, right?

23 **A.** That was one of two hypothesis that he's considered for
24 the 30 percent.

25 **Q.** Right. So the point -- the logic of that is if somebody

1 is charging unsustainably low prices and just not making them
2 unsustainably low anymore might increase a substantial price
3 increase?

4 **A.** You know, in that scenario, yes. Dr. Peters explores
5 different reasons that could explain that price increase.
6 And I could talk about the other, if you would like.

7 **Q.** You did a retrospective of your own on the
8 Delta/Northwest merger, right?

9 **A.** Yes, I did.

10 **Q.** And in that one, the highest value that you could find
11 for a price increase, after experimenting with different
12 control groups, was 6 percent on connecting routes with more
13 than 10,000 passengers, right?

14 **A.** I think that's a misaccurate (phonetic) characterization
15 of the article, and I can explain why, if you would like.

16 **Q.** No, your Honor counsel can have you do that.

17 But the reported -- the largest reported fare
18 increase in the article is 6 percent on connecting routes
19 with more than 10,000 passengers, right?

20 **A.** I could look at the paper if you'd like me to confirm.

21 **Q.** Okay. We'll move on.

22 You know that many of the routes that are affected
23 by the NEA are associated with American Airlines hubs, right?

24 **A.** Many of the nonstop overlaps connect to an American hub.
25 I believe that some of them do.

1 **Q.** Right. And there have -- economists have actually
2 studied retrospectively the effect of the
3 US Airways/American Airlines merger on hub routes, or routes
4 associated with hubs, right?

5 **A.** I believe there's at least some work that does that.

6 **Q.** There's a paper on that by Huubin H. Le -- that's
7 H-u-u-b-i-n H. L-e -- entitled, "An Ex Post Analysis of the
8 US Airways/American Airlines Merger," right?

9 **A.** Yes, I --

10 **Q.** This was discussed yesterday with Dr. Town?

11 **A.** Two days ago.

12 **Q.** Two days ago, I suppose. Yeah. And Dr. Le found that
13 the American/US merger decreased price and significantly
14 increased output in routes associated with hubs, right?

15 **A.** I haven't reviewed this paper.

16 **Q.** Well, assume I'm correct about that. Charlotte is an
17 American Airlines hub, but you predict a 90 percent price
18 increase, right? From Boston?

19 **A.** A 90 percent price increase between, I believe, Boston
20 and Charlotte.

21 **Q.** So Boston and Philadelphia would be associated with an
22 American Airlines hub, but you predict a 44 percent price
23 increase, right?

24 **A.** I would want to review the slides to confirm.

25 **Q.** In fact, you have seven markets between Boston and New

1 York that are associated with American Airlines hubs on which
2 you predict substantial price increases, even though the
3 literature shows that airline mergers are associated with
4 decreased prices on routes associated with hubs, right?

5 **A.** I don't believe the literature shows that convincingly
6 and I can talk about this, if you'd like.

7 **Q.** Now, one of the ways that you've tried to justify this is
8 by saying that the experience with JetBlue entry and exit is
9 that -- your results are consistent with the experience of
10 JetBlue entry and exits, right?

11 **A.** That is correct.

12 **Q.** Let's pull up Miller Direct Demonstrative, Slide 66.

13 Now, we'll recall here that all of the bars on the left are
14 what you said were examples of the JetBlue effect taken from
15 defendants' ordinary course documents. Right?

16 **A.** That's correct.

17 **Q.** And you meant JetBlue documents, right?

18 **A.** Yes. This is JetBlue analysis. Yes. A JetBlue
19 analysis.

20 **Q.** And by ordinary course, you meant, for example, advocacy
21 by JetBlue in regulatory efforts to get airport access to
22 slots or whatever, right?

23 **A.** This part may not be clear to me.

24 **Q.** Okay. Well, you cite, among other things, and you
25 mentioned yesterday that one of the data points was a letter

1 from JetBlue to the UK Competition and Markets Authority,
2 right?

3 **A.** That is correct. That's the basis, I think, of the
4 pre -- one of the slides previously.

5 **Q.** Okay. In all events, you did nothing yourself to verify
6 any of the claims underlying those blue bars, did you?

7 **A.** No, I did not.

8 **Q.** Okay. It is nothing like what you did on the effect of
9 legacy competition on price and presented yesterday, right?

10 **A.** Well, the defendants' economist did that.

11 **Q.** But you haven't done anything to inform us of what the --
12 what the average effect is on fares when an LLC enters or
13 exits a route with one or more legacy carriers, have you?

14 **A.** I have not done that.

15 **Q.** No. And the reality is that what this is showing here is
16 not the loss of independent JetBlue competition, but the
17 elimination of JetBlue capacity from the route, correct?

18 **A.** This shows the implications of the loss of JetBlue from
19 the market, the loss of a product from the market.

20 **Q.** The capacity?

21 **A.** The product. As an economist, that's the way I'll think
22 about it here. It is no longer serving the market.

23 **Q.** The product and its capacity, together?

24 **A.** That would be a reasonable interpretation.

25 **Q.** Okay. And so did you get some impression in your study

1 of the NEA that part of the plan is to eliminate JetBlue's
2 product and capacity from the relevant markets?

3 **A.** My understanding is that sometimes that can be the case,
4 but -- but I -- you know, in the model, I just think -- I
5 look at prices.

6 MR. WALL: Thank you, sir. No more questions.

7 THE COURT: All right. Any redirect?

8 MR. DERITA: Yes, Your Honor.

9 **REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF USA**

10 BY MR. DERITA:

11 **Q.** Dr. Miller, I'd like to start by talking about a year in
12 review article from 2008 to 2009. Do you remember that
13 article that you were talking about earlier?

14 **A.** Yes, I do.

15 **Q.** You had mentioned that there was a subsequent year in
16 review article; is that right?

17 **A.** Yes.

18 **Q.** I pulled up a -- I pulled up a 2013 to 2014 year in
19 review article. Is this the article that you had in mind?

20 **A.** Yes, it is.

21 **Q.** I have some paper copies that we'll hand you a copy
22 and --

23 **A.** I appreciate that.

24 **Q.** I'd like to direct you to page 383?

25 **A.** I do see it.

1 **Q.** Okay. And let's look at the first full paragraph and I'm
2 going to read it first. "Recent legacy airline mergers have
3 been followed by substantial reductions in service and
4 capacity on routes that were served by both carriers prior to
5 those mergers. For example, in 2008, when Delta Air Lines
6 and Northwest Airlines proposed to merge, they claimed the
7 merger would generate consumer benefits by facilitating
8 schedule improvements by allowing for more efficient
9 allocation of aircraft across the network, and through
10 marketing synergies that could make the merged carriers
11 service more attractive to consumers. Despite promises to
12 the contrary, the combined Delta-Northwest airline instead
13 reduced capacity post-merger including significant cuts at
14 former hubs in Cincinnati and Memphis."

15 Do you see that paragraph?

16 **A.** Yes, I see it.

17 **Q.** Does this paragraph relate to the point that you were
18 trying to make earlier?

19 **A.** Partially. I mentioned earlier that the defendants' --
20 that the DOJ's analysis held fixed the schedules proposed by
21 Delta and Northwest. Those schedules ended up being
22 inaccurate. This characterizes the actual effects.

23 The other part of the context that was -- that I
24 can provide about the DOJ investigation is that, you know, as
25 the previous article says, DOJ economists looked at the

1 likely anticompetitive effects, determined that they were not
2 significant. We did some rule of thumb calculations about
3 what efficiencies might be. These are not sophisticated
4 calculations that we did, but you know, modest amounts of
5 efficiencies, given the route schedules, would have been
6 likely to be larger than the anticompetitive effects that the
7 economists were analyzing. So I think that's the context.

8 **Q.** Can we take a look at footnote seven on that page?

9 **A.** Yes.

10 **Q.** Does this add any color to what you were just describing?

11 **A.** It does. This is the QSI methodology, the way I think
12 about it is this is the old version of Raven, although that
13 might not be exactly correct, but this is sort of the normal
14 course software that was used to forecast schedules, and the
15 benefits created by them. And the footnote states that that
16 methodology was inadequate for a merger evaluation, but I
17 didn't work with the QSI model specifically, so I remember
18 that part of it at a high level.

19 **Q.** Okay. I'd like to turn back to --

20 **A.** Oh, I should also say, when I say it's a predecessor to
21 Raven, also, these are different airlines, so it can't be --
22 you know, but it's a normal course tool that would have been
23 relevant back then.

24 **Q.** Okay. I'd like to turn back to you catchment -- the
25 catchment analysis slides we discussed earlier. I'm not

1 going to put them up on the screen, because they were --
2 because they're redacted, but you have a copy in front of
3 you, it's slides 83 and 84.

4 **A.** I've got so many binders here, I don't know which one --
5 I think it's this one.

6 **Q.** The smallest one, I believe.

7 **A.** Okay. 83, 84. I have it.

8 **Q.** When Mr. Wall was asking you questions about these, there
9 was an explanation that you offered to give, but did not give
10 about them. Do you recall that?

11 **A.** Can you direct me to the specific line of questioning
12 that was at stake here, so I can refresh my memory?

13 **Q.** Using a box as a podium makes it really hard to keep
14 myself organized here.

15 I believe that the question was related to a
16 discussion of the *Horizontal Merger Guidelines* and doing
17 market analysis based on the location of customers versus
18 suppliers.

19 **A.** Yes.

20 **Q.** Do you remember that?

21 **A.** Yes, I can clarify this. And I can use the -- the maps
22 actually help. So in the context for the guidelines and what
23 they call on you to do is to start with the competition of
24 the merging firm, the location of the supplier of the
25 products in question. And so the products at stake in this

1 agreement are the JetBlue and American products,
2 predominantly at LaGuardia and JFK. So we're going to focus
3 on those areas. I'll include in the market all the
4 competitors that are competing in JFK and LaGuardia, along
5 the various routes.

6 Okay. So in this sense, the geographic market will
7 be based on the location of the supply, JFK and LaGuardia,
8 rather than on the location of the customers. Okay? Now,
9 what the merger guidelines ask us to do is evaluate the
10 prospect that a loss of competition in this geographic space
11 would lead to higher prices, or could increase market power.
12 And that's the context for the Hypothetical Monopolist Test.
13 And in answering that question, you know, we're focused on
14 whether it makes sense for folks at JFK and LaGuardia to
15 raise price, and in answering that question, the decisions
16 that customers make becomes very relevant.

17 And so the purpose of the catchment maps is that it
18 shows you how the customer locations relate to the -- the
19 location of the airports, and that's why when I said that
20 these -- it will be inaccurate to characterize the maps as
21 characterizing only the customer locations is because it
22 characterizes the customer locations and the choices they
23 make relative to the airports. And what it shows is that
24 there are customers that are located near JFK and LaGuardia
25 that have a very strong preference for those airports, where

1 if you look at sort of the draw area --

2 THE COURT: Strong preference based on the fact
3 that they, over that period of time, went to those airports?

4 THE WITNESS: That's right.

5 So what the maps show, for example, is that if you
6 look at the draw area that accounts for the vast bulk of the
7 business at JFK and LaGuardia, the 90 percent of those
8 customers are choosing JFK and LaGuardia. And so the
9 decisions that these customers are making becomes informative
10 about whether a hypothetical monopolist or -- you know, at
11 JFK and LaGuardia might be able to increase its market power
12 above levels that are observed today. Okay? But that's the
13 purpose that I'm using this and that's why, you know, I find
14 it to be informative about --

15 THE COURT: That data is not controlled -- I'm
16 sorry. That data is not controlled for other effects during
17 that period of time.

18 THE WITNESS: Yeah, these are -- this is a very
19 straightforward analysis, you know, where do they live.

20 THE COURT: Where do they live and where did they
21 go.

22 THE WITNESS: Where did they go. That's right.

23 THE COURT: Not further sliced or analyzed with
24 respect to what happened from the 30 day period of time if a
25 certain airline did a certain thing with respect to service

1 or price.

2 THE WITNESS: That's correct. Right. So this is
3 going to get you a broad pattern. This is why I say it's
4 consistent with this notion of diversion, but it's not going
5 to get us all the way there.

6 THE COURT: Right.

7 BY MR. DERITA:

8 Q. So while we're on the topic of the merger guidelines, I'd
9 like to revisit those for a minute. You should still have a
10 copy of them in your binder. I'd like to direct you to
11 page 3, Section 2.1.1. And just let me know when you're
12 there.

13 A. 3.2.1?

14 Q. 2.1.1 on page 3.

15 A. Okay. Yes, I'm there.

16 Q. So this -- this section discusses effects observed in
17 consummated mergers and you were asked a series of questions
18 about the weight of whether effects are likely to rise in
19 the -- about evidence related to whether effects were ever
20 risen or not. I'd like to direct you to about halfway down,
21 there's a section that says, "However." And I'll read it out
22 and we'll highlight it on the screen.

23 "However, a consummated merger may be
24 anticompetitive even if such effects have not yet been
25 observed, perhaps because the merged firm may be aware of the

1 possibility of post-merger antitrust review and moderating
2 its conduct. Consequently, the agencies also consider the
3 same types of evidence they consider in evaluating
4 unconsummated mergers."

5 Did you consider these types of evidence?

6 **A.** Yeah, I considered whether it would be helpful to look at
7 consummated mergers. And for reasons that I explained, I
8 didn't view -- oh, excuse me, I'm on the wrong track here.

9 **Q.** Yes, I'm asking --

10 **A.** I did contemplate and considered whether it would make
11 sense to look at price changes along overlap routes that may
12 or may not have occurred since the NEA was implemented and
13 determined that an exercise was unlikely to be helpful. And
14 actually, for two reasons. One is -- for three reasons. Two
15 big ones, I think. One is on the board, which is that
16 pricing is -- my interpretation is that it was conducted in
17 the shadow of litigation and I'm wary about interpreting firm
18 decisions in that context.

19 But the second reason that I didn't view it
20 helpful, likely to be informative to look at actual pricing
21 is that the NEA was implemented during the COVID, and COVID
22 is just -- it's a really pronounced shock, it almost
23 completely eliminated airline traffic. And then it came
24 back -- as it's been coming back, it's differentially
25 effected routes of different types. So like the leisure

1 traveler has -- have come back faster than the business
2 traveller for one reason or another, and so it makes these
3 effects on different routes really hard to tease out. And so
4 we -- you know, in light of that, plus the fact the NEA was
5 implemented gradually, rather than just in one spot, I just
6 determined that it was unlikely to be helpful to pursue that
7 course of inquiry.

8 **Q.** So kind of taking a step back, what's your interpretation
9 of this section of the *Horizontal Merger Guidelines* and
10 whether the evidence of future effects is informative when
11 evaluating a transaction like the NEA?

12 **A.** Well, I think the guidelines, as a general principle,
13 asked economists, asked attorneys to look at all of the
14 available evidence and assess what types of evidence are most
15 likely to be probative about the likely competitive effects.
16 And that's what I've tried to put together in my report, is
17 identifying the sources of information that will illuminate
18 the likely competitive effects.

19 **Q.** Let's move down to Section 2.1.2. And let's go to the
20 first sentence there.

21 "The agencies look for historical events or natural
22 experience that are informative regarding the competitive
23 effects."

24 Did you do any natural experiments?

25 **A.** I've done a lot of this. And I've looked at the

1 competition that legacy carriers bring to markets, and I did
2 two econometric analyses of those, and I showed how the
3 competitive effects that we obtained both with, you know,
4 comparing the role of more or less legacy competitors aligns
5 with the effects of the merger. I looked at the 737 MAX
6 grounding and showed that when American's competition was
7 reduced, JetBlue found a profit to raise price and did raise
8 price. I provided document -- or testimony that's consistent
9 with my interpretation of that particular event.

10 And I also looked at the JetBlue experience. The
11 JetBlue effect as it arrives in different markets. And I can
12 explain why an entry event like JetBlue, the price effect on
13 the entry of it like JetBlue, is going to be useful in
14 providing a benchmark against which to compare the model.

15 **Q.** And I know you had mentioned that before, but can you
16 just refresh us on why that's useful?

17 **A.** Yeah, there's -- I think there is, in my
18 cross-examination, almost an assertion by counsel or a
19 question that might lead you -- might lead someone to think
20 that the removal of a product would lead to a bigger price
21 effect than aligning the financial interests of the product,
22 of two products in a market. And that's not the case. Okay?
23 So if we have -- if we think about the logic of upward
24 pricing pressure, you have a recapture story, where -- where
25 one product can raise price, and recapture some on the other,

1 and it's symmetric, and this generates price elevation.

2 When you simply remove a product from the market,
3 there's no more upward pricing pressure on the remaining
4 product, because it can't recapture anything. And so the
5 logic that creates the price increase is a little bit
6 different, that --

7 THE COURT: Why wouldn't then there be the upward
8 pricing pressure in the change of supply and demand ratio?

9 THE WITNESS: The reason it happens is that the
10 relevant demand, consumer demand for this product becomes
11 less elastic. And what I mean is consumers become less price
12 sensitive, because they have fewer choices. Okay? And so
13 just if you do economic theory, it can be the case that, you
14 know, a removal of a product generates lower price effects
15 than merger simulation on which -- merger simulation or
16 simulation involving combined joint incentives like the NEA.
17 And I haven't done a systematic analysis of that to show
18 that, along the particular routes that's necessarily going to
19 be true, but I just -- I don't want to leave sort of the
20 assertion --

21 THE COURT: It would sort of depend upon the
22 elasticity and demand on the route and also --

23 THE WITNESS: And things like this.

24 THE COURT: -- the percentage of recapture?

25 THE WITNESS: Yes.

1 THE COURT: So the recapture effect depends on how
2 much you're recapturing.

3 THE WITNESS: That's right, so --

4 THE COURT: So it might be more of a recapture
5 effect if you're recapturing 90 percent than 1 percent.

6 THE WITNESS: That's definitely true. But if you
7 take a product out of a market, or substantially reduce its
8 capacity, the recapture effect is actually smaller. So it's
9 not the case that the JetBlue effect is just sort of
10 mechanically a lot bigger than the model. And I actually
11 view it as pretty powerful corroborating evidence, that the
12 model is getting something that is close to what we see in
13 the data.

14 BY MR. DERITA:

15 **Q.** Yesterday at the end of Mr. Wall's cross, you were asked
16 a series of questions with adjectives like "strong" and
17 "significant" in the context of -- we'll use Spirit, for
18 example, provides competition from Newark. Do you recall
19 that?

20 **A.** Yes, I recall that exchange.

21 **Q.** Is there a framework that you would use to assess whether
22 competition is strong or substantial enough to be included in
23 a relevant market?

24 **A.** Yes, I have a framework for that.

25 **Q.** What is it?

1 **A.** It's the Hypothetical Monopolist Test. And so the
2 important thing is whether -- whether the evidence suggests
3 that there's enough diversion flowing into Newark, or other
4 sources, to constrain the exercise of market power. And what
5 I've got is a set of evidence that's based on direct customer
6 behavior that suggests that the answer is -- that there's --
7 the answer is no. And that's also, actually, consistent with
8 supply side behavior that corroborates the conclusions on
9 sort of my understanding of how customers have choices. And
10 I showed you some of that supply behavior in my slides when I
11 showed you that JetBlue tends to match prices at JFK and
12 LaGuardia, but less often for Newark, and similarly for
13 American. And so that sort of supply side behavior is
14 consistent with -- it's consistent with consumers making
15 decisions as the way that the data tells them they need to
16 make decisions. And there's a host of other supply side
17 decisions that firms have made that, to me, is consistent
18 with what I found. And maybe I can summarize those for you,
19 if those -- if that's possible, if this continues, in
20 paragraph 106 and 107 of my original report. And it's
21 focused on the reasons that JetBlue chose to expand into
22 Newark and some of the considerations that JetBlue is looking
23 at.

24 And the documents contained in those two paragraphs
25 will provide one document in particular that suggests that

1 JetBlue moved into Newark in part to gain access to a new
2 customer base, because Newark's catchment area is different.
3 Another quote would come from -- I believe it's deposition
4 testimony from Mr. Laurence, in which he considers a
5 particular route. And I think it's to San Juan, in which he
6 says flying that route from Newark won't cannibalize our
7 business on the same route from Newark and LaGuardia and the
8 third point focuses on transcon in particular. And in that
9 analysis, in this document, the JetBlue document states that
10 in the particular Newark to transcon -- and I think it may be
11 San Francisco and LA specifically, there's no other LCC
12 competitor in the -- in the Newark transcon market. Whereas,
13 there may have been over in LaGuardia and JFK. And so that
14 sort of supply side behavior, to me, makes sense given what
15 I've been able to measure about how consumers make decisions.

16 **Q.** Why do you use that framework?

17 **A.** Well, the framework of the Hypothetical Monopolist Test
18 is a really nice way to think about putting a merger or an
19 agreement in the context of the question of whether it's
20 likely to create harm and here's what I mean by that, is
21 that, if we can define a set of products over which we know a
22 hypothetical monopolist would be bad, we don't want a
23 monopoly over this set of products. Then we can ask the
24 question, how much closer does the merger or the agreement
25 get us to that situation? And so that's the framework, is we

1 identify a set of products where we know that there would be
2 a problem if there's no lost competition. And so for me
3 that's the routes that come out of JFK and LaGuardia, where
4 you got competition from Delta and JFK and American and other
5 providers.

6 And within this framework, I used the Hypothetical
7 Monopolist Test, I identified that region as a potential
8 problem for loss of competition, and then that enables an
9 analysis of market concentration and the Hirfindahl Indices,
10 and that's -- sort of gives us information about how much --
11 how much an alliance or agreement or merger would push you in
12 that direction. And so that's, I think, the logic of the
13 Hirfindahl Index screens.

14 **Q.** Okay. Yesterday you were shown a DOT document. Do you
15 remember that document?

16 **A.** No, I don't remember.

17 **Q.** Okay. Let me grab it. If you can go to DX1083 in your
18 binder. It would have been the binder that's like less full
19 from yesterday.

20 **A.** I don't believe I have the binder that was given to me
21 yesterday. I can see it on the screen, though.

22 **Q.** Yeah. I'm not really going to go too far into the
23 document. I just wanted to put it on the screen, but do you
24 recall this document?

25 **A.** Vaguely.

1 Q. Do you recall -- are you aware of the context of the
2 transaction being considered by the DOT here?

3 **A.** I was able to glean something in my interactions with
4 Mr. Wall that it had to do with the -- you know, reading the
5 title of the assignments of the schedules at Newark-Liberty
6 International Airport from 2022.

7 Q. So I'd like to show you a document marked as PX433.

8 | THE COURT: PX or DX?

9 MR. DERITA: PX, which has already been admitted
10 into evidence. And I don't believe we have paper copies of
11 it.

12 | THE COURT: Can you put it up on the screen?

13 MR. DERITA: Yeah, we're going to put it on the
14 screen.

15 | (Counsel confers.)

16 BY MR. DERITA:

17 Q. So if we can go to -- actually, we can stay here. So
18 this document is a submission from JetBlue, in relation to
19 the same DOT matter. I'd like to direct you to page 2.

A. Yeah, I can see it here.

21 | Q. Yup. Great.

22 So if you look at about halfway down the paragraph,
23 there's a line there that reads, "15 of the 29 new JetBlue
24 destinations were previously monopoly markets that only
25 United served from EWR and which have benefitted the most

1 from new, much needed low-fare competition."

2 How do you interpret that statement by JetBlue in
3 that submission?

4 **A.** Well, I'm cautious to interpret the literal word
5 "market," because I think people use markets to mean
6 different things. And I'm defining, for the purposes of my
7 analysis of market, it is meant to focus on the likely
8 competitive effects of the NEA.

9 But what is more relevant is the notion of
10 introducing competition at Newark specifically could lower
11 prices. Because that's telling me that competition affects
12 prices along those routes, which would be inconsistent with
13 those routes being relevant markets in the context of the
14 guidelines framework.

15 **Q.** How would you interpret "monopoly markets" in the
16 sentence?

17 MR. WALL: Objection. Calls for speculation.

18 THE COURT: Sustained.

19 BY MR. DERITA:

20 **Q.** Does the use of the term monopoly markets in the sentence
21 mean anything to you?

22 **A.** My interpretation of --

23 MR. WALL: Objection.

24 THE COURT: Overruled.

25 THE WITNESS: My interpretation of monopoly markets

1 is that along particular routes served from Newark, only -- I
2 don't know if it's only nonstop or total, but we'll just say
3 there's only one provider serving that -- serving that route.
4 That particular characterization is one that I wouldn't
5 necessarily even say this is a valid antitrust market in the
6 normal way, just because I think that people use the word
7 market to mean different things, and I don't the particular
8 context with which DOT is using it here.

9 MR. DERITA: Okay. We can pull that document down.

10 BY MR. DERITA:

11 Q. Let's go back to the collaboration guidelines. And you
12 have a copy of these in the binder from earlier today?

13 | A. Yes.

14 Q. I'd like to direct you to page 5. There was a lot of
15 discussion about the collaboration guidelines earlier today.
16 Are there any sections of the collaboration guidelines that
17 were not discussed that you relied upon to inform whether it
18 was appropriate or not to use merger tools to evaluate the
19 NEA?

20 **A.** To be honest, I don't remember all of the cross. But
21 I -- you know, in my report, I do explain the section of the
22 collaboration guidelines that leads me to think that it's
23 appropriate to turn to the *Horizontal Merger Guidelines*. And
24 maybe it's here on section -- on page 5.

25 Q. Yeah, so let's go back to the four factors that were

1 discussed earlier at the bottom of the third paragraph there.

2 **A.** Yes.

3 **Q.** So let's go to factor (a), "The participants and
4 competitors in that relevant market." How does that factor
5 apply to the NEA?

6 **A.** Well, my analysis indicates that American and JetBlue are
7 competitors in many relevant markets.

8 **Q.** What markets are you referring to?

9 **A.** All of the nonstop overlaps, but also the mixed overlaps
10 and the connect overlaps. All of these are relevant markets
11 in which JetBlue and American compete. And you know, the
12 number of markets is actually quite large. I can look in the
13 report to tell you exactly how many. But there's many, many
14 connect markets, for example, in which they compete.

15 **Q.** Okay. Let's go to factor (b), "The formation of the
16 collaboration involves efficiency enhancing integration of
17 economic activity in the relevant market." What's your
18 enhancement of that for the NEA?

19 **A.** Well, there's certainly and integration of activity, of
20 economic activity, the extent to which is efficiency
21 enhancing. You know, above and beyond what would be obtained
22 without NEA is a conversation that, you know, many people are
23 having, but is certainly represented by the parties that this
24 would be the case.

25 **Q.** Factors?

1 **A.** By the defendants.

2 **Q.** Factor (c), "Integration eliminates all competition among
3 the participants in the relevant market."

4 How would you evaluate that factor with respect to
5 the NEA?

6 **A.** I think this is consistent with my interpretation that
7 the NEA effectively ends competition between American and
8 JetBlue, along the routes that touch NEA airports, both
9 because the NEA allows for capacity coordination, allows for
10 American and JetBlue to make those decisions in their mutual
11 best interest, and because it aligns their pricing
12 incentives. And so my interpretation is that this is
13 consistent with my analysis.

14 THE COURT: Are you done with this little part or
15 not yet?

16 MR. DERITA: I was just reviewing the transcript to
17 figure out if I have a follow-up question.

18 BY MR. DERITA:

19 **Q.** And then, (d), "The collaboration does not terminate
20 within a sufficiently limited period by its own specific and
21 express terms."

22 What is your evaluation of that with respect to the
23 NEA?

24 **A.** My understanding of the NEA is that it automatically
25 renews each five years. Of course, this allows for

1 termination. But the same is actually true with a merger,
2 because a firm that has merger sometimes divests assets and
3 we see that happening, as well. So I determined that, you
4 know, interpreting this line within the guidelines is
5 consistent with my analysis of the NEA as introducing the
6 same sorts of incentives and problems that a merger might.

7 THE COURT: If you're done -- are you done with
8 this part or no?

9 MR. DERITA: Yup, done with this document; I was
10 moving on to the next.

11 THE COURT: And you have more than --

12 MR. DERITA: Probably about a half hour.

13 THE COURT: We'll stop here, then.

14 All right. I'll see you tomorrow morning, 9:00
15 a.m. We're adjourned. Have a good day.

16 (Court in recess at 1:03 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

4 I, Rachel M. Lopez, Certified Realtime Reporter, in
5 and for the United States District Court for the District of
6 Massachusetts, do hereby certify that pursuant to Section
7 753, Title 28, United States Code, the foregoing pages
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9 reported proceedings held in the above-entitled matter and
10 that the transcript page format is in conformance with the
11 regulations of the Judicial Conference of the United States.

Dated this 13th day of October, 2022.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter